

Office Supreme Court

FILED

MAY 11

JAMES H. MOX

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

vs.

OMAHA WATER COMPANY,

Respondent.

No. ~~100~~

PETITION FOR WRIT OF CERTIORARI.

JOHN LEE WEBSTER,
CARL C. WRIGHT,
HARRY E. BURNAM,
Attorneys for Petitioner.

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

VS.

OMAHA WATER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, the City of Omaha, represents that this is a suit in equity brought by the *Omaha Water Company v. The City of Omaha* in the Circuit Court of U. S., for District of Nebraska and appealed to U. S. Circuit Court of Appeals for Eighth Circuit to compel the city to purchase the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence, for the sum of \$6,263,295.49. Said valuation was the result of an award arrived at under an election by the city to purchase, but which award was signed by two of the appraisers and not concurred in by the third appraiser. The said award was made under a contract between the city and the Water Company which the United States Circuit Court of Appeals has adjudged to be a public as distinct from a private contract.

The matters involved are of great public interest and importance to the 175,000 people living in said cities and

towns, and questions which to many of said citizens are of grave and serious concern for reasons to be stated.

It is a case which presents questions of law about which there is serious conflict in the decisions between the different courts, state and federal, and between the federal courts. In one turning point in the case the Circuit Court of Appeals, between these same litigants, has handed down two opinions inconsistent with each other, one holding the contract between the city and the Water Company to be a public contract, and the other holding the same contract to be a private contract, and on these conflicting and contradictory constructions of the said contract, rendered judgment against the city of Omaha in each case.

The fundamental and primary objections to the award are as follows:

- (1) That the award is void because not concurred in by the three appraisers, as required by the terms of Section 14 of Ordinance 423.

- (2) The award is void by reason of misconduct of the Omaha Water Company and the Board of Appraisers in secretly and privately examining the books of the Water Company in the City of Cincinnati, Ohio, more than a year after the public taking of testimony had been closed and the case submitted, and which said secret and *ex parte* examination of the books of the Water Company was made against the protest of the City of Omaha and under an agreement by which the appraisers were to receive the said evidence and not disclose the same to the adverse party, and which said books contained material evidence bearing upon the "going value" of the water works, and also upon the cost of the construction and the purchase prices of material, including water mains and pumping engines.

(3) That the said award is void in that it includes extensions of the water works in the outlying municipalities used for the sole purpose of supplying outside municipalities with water, and which were not constructed under any franchise contract or authority conferred upon the Water Company by the City of Omaha, and that the City of Omaha was, and is, without power to appropriate money, levy a tax or issue bonds to pay for the purchase thereof.

Your petitioner further represents the material and important facts to be that in 1880, the City of Omaha by an Ordinance, No. 423, and amended by Ordinance No. 430, entered into a contract with a predecessor of the Omaha Water Company for the construction of water works in the City of Omaha to supply the City of Omaha with water for fire protection, public and domestic use. The said Ordinance by Section 14, reserved to the City of Omaha the election to purchase the water works at any time after twenty years "at an appraised valuation which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, these two to select a third."

In 1903, the City of Omaha, by an Ordinance, elected to purchase the water works under the said provision of Section 14 of Ordinance 423, and appraisers were appointed as provided in said Section 14, to-wit: one by the City of Omaha, one by the Omaha Water Company, and these two appointed a third.

The three appraisers organized as a board of appraisers July 20, 1903, and began their sittings in the City of Omaha as an open, public body, gave notice to the respective parties of their meetings, and the respective parties appeared by their attorneys before the said board of appraisers and formally produced and examined wit-

nesses under oath, and produced documentary evidence, and such manner of producing and receiving evidence continued from time to time until the 31st day of December, 1904, at which time the offering of evidence was concluded. The case was then argued orally and upon printed brief by the attorneys for the respective parties, and taken under advisement by the board of appraisers.

February 7, 1906, the appraisers held a meeting in Cincinnati, Ohio, of which notice had been given to the Water Company but no notice of which was given to the City of Omaha. At the time of the said meeting and pursuant to a written request, signed by one member of the board of appraisers, the Omaha Water Company shipped from the City of Omaha to Cincinnati, its books of account covering its business from 1896 to 1905, being some thirty volumes and weighing several hundred pounds.

At said time, Mr. Fairfield, the manager, and Mr. Stockton Heth, the treasurer of the Omaha Water Company, also went to Cincinnati, and the said Fairfield, as manager of the Omaha Water Company, then and there personally appeared before the board of appraisers and presented the said books for the private and personal examination of the board of appraisers, but with the understanding between the Water Company and the board of appraisers that the City of Omaha should not have an opportunity to see or examine said books or to be informed of their contents.

The attorney for the City of Omaha incidentally learned of the shipment of the said books of the Omaha Water Company to Cincinnati for the purpose of said secret *ex parte* examination, and thereupon the said attorney for the City of Omaha wrote and transmitted to the chairman of the board of appraisers a protest against this secret and *ex parte* examination of the books.

When the manager of the Omaha Water Company appeared before the board of appraisers with the said books, the said letter from the City Attorney was presented to him for his perusal and asked what he had to say in reply to it. Thereupon the manager of the Water Company insisted that the board of appraisers had a right to examine the said books to obtain therefrom such information as the books contained, to be used in fixing the value of the water works, and protested against any examination of the said books by the City of Omaha, and insisted that the said examination should be private and *ex parte*, and that it was none of the business of the City of Omaha what use or examination the board of appraisers made of the said books. Thereupon the board of appraisers accepted the said books, proceeded to make an examination thereof, and subsequently transmitted the said books to the City of Chicago and employed an audit company to make a report therefrom to the board of appraisers.

At the instance of the chairman of the board of appraisers, Stockton Heth, the treasurer of the Water Company, went from Cincinnati to Chicago to give such assistance to the audit company as it desired in preparing its said report, and while in Chicago had several interviews touching the subject matter with the chairman of the board of appraisers.

A report was made to the board of appraisers by the audit company, but which report was not submitted to the inspection of, nor its contents disclosed to the City of Omaha. All these matters and things were conducted with the understanding between the Water Company and the board of appraisers that the City of Omaha should not be permitted to know any of the matters or things appearing in the said books or in the said report.

Your petitioner further represents that two of the members of said board of appraisers lived in the City of Chicago and the other lived in the City of Milwaukee, and no reason was assigned for holding this *ex parte* meeting in the city of Cincinnati, February 7, 1906, at a date more than one year after the public taking of testimony had been closed, arguments made and case submitted. In truth and in fact the board of appraisers could have met in the City of Omaha and then and there have examined the books of the Water Company in said city as well as to have had this secret meeting in Cincinnati, so far as your petitioner is informed and believes, unless it be that it was desired to have the examination of the books in the City of Cincinnati to avoid the discovery thereof or any interference therewith by the City of Omaha.

Your petitioner further avers that by reason of the premises above stated, the Omaha Water Company and the board of appraisers were guilty of such misconduct as renders the award void and deprives the City of Omaha of a "square deal" in the premises.

Your petitioner further avers that on the 7th day of July, 1906, two of said appraisers signed an award fixing the valuation of the property of the Omaha Water Company at the sum of \$6,263,295.49, and the third appraiser refused to concur in said award but added thereto, over his signature, the words, "I do not concur in the above report, nor in the values as fixed therein." That up to the time of the final signing of the said award, all the parties in interest, including the board of appraisers, understood and acted on the theory that the clause in the contract under which the election to purchase was made required the valuation of the water works to be determined by the joint concurrence of all three appraisers. It

was only when it was ascertained at the last moment that the three appraisers could not agree that two of the appraisers handed down the award in controversy.

Your petitioner further avers that the award is void and should not be enforced for the reason that it includes not only the water works used for supplying the City of Omaha with water, but includes such parts of the water works system as have been extended into and used solely and only for the purpose of supplying the municipalities of South Omaha, East Omaha, Dundee and Florence with water for fire protection, public and domestic uses.

Your petitioner further avers that when in 1880 the said contract was entered into with the City of Omaha, the outlying municipalities of East Omaha, South Omaha and Dundee were not in existence and were not within the contemplation of the parties to the contract, and that the election to purchase made by the City of Omaha under its option, was limited to the water works which the city had contracted for the construction of and which was used for the supplying of the City of Omaha with water for fire protection, public and domestic use and did not include outlying properties.

Your petitioner further avers that the City of Omaha did not, and does not have municipal authority to purchase the water works in the said outlying municipalities and is without power to appropriate money, to levy a tax, or to vote bonds to pay the purchase price therefor.

Your petitioner further avers that the facts stated in the foregoing paragraphs of this petition appear in the printed record in this case, and each and singular of the same were submitted to the Circuit Court and to the United States Circuit Court of Appeals for their consideration on the respective hearings.

Your petitioner believes that the judgment and de-

cree of the United States Circuit Court of Appeals for the Eighth Circuit is erroneous in the following particulars:

1. That the Court erred in holding that the terms of the contract reserving to the City of Omaha the election to purchase the water works authorized a valuation of the water works by a majority of the three appraisers, whereas the Court should have held that by the terms of the contract the valuation of the water works could only be ascertained by the concurrence of the three appraisers.

2. The Court erred in holding that the valuation of the water works, under the election clause in the contract, was in the nature of a public appraisalment in which the appraisers were acting for the public as distinct from an appraisalment under a contract between individuals or private corporations, whereas the Court should have held that the said contract between the City of Omaha and the Water Company as between the contracting parties, was governed by the same rules, principles and obligations that govern contracts between individuals or private corporations, as the same Court had previously held in the suit of the *Omaha Water Company v. The City of Omaha*, 147 Fed., 1.

3. That the Court erred in holding that the secret and *ex parte* receiving in evidence and examination of the books of the Omaha Water Company at Cincinnati, February 7, 1906, was not an improper procedure and was justified by precedent, whereas the said Court should have held that the same was misconduct on the part of the Omaha Water Company and on the part of the board of appraisers, and that said misconduct rendered the award void.

4. The Court erred in holding that the election to purchase by the City of Omaha included all the proper-

ties of the Omaha Water Works system, including the parts lying in the said outlying municipalities, and used only for the supplying of the said outlying municipalities with water, whereas the Court should have held that the said election to purchase, by its terms, was limited and confined to that part of the water works constructed under the contract with the City of Omaha, and used only for the purpose of supplying the City of Omaha with water for fire protection, public and domestic uses, and was so limited by Section 14 of the contract between the City of Omaha and the Water Company, said Section being the only authority under which the election to purchase existed.

5. That said Court erred in holding that the City of Omaha had corporate authority to purchase that part of the water works system extended into and used only for supplying the municipalities of East Omaha, South Omaha and Dundee with water, whereas the Court should have held that the City of Omaha was possessed of municipal authority to purchase only that part of the water works used for the supplying of the City of Omaha with water for fire protection, and public and domestic use, and such as was necessarily appurtenant thereto.

6. That the Court erred in reversing the decree of the Circuit Court and affirming the award and should have entered its order confirming the decree of the Circuit Court dismissing the bill of complaint.

7. That the Court erred in directing the Circuit Court to enter a decree finding that the award was in all things valid, and that the City of Omaha was required to accept the deed tendered by the Omaha Water Company and to pay for the said property the sum of \$6,263,-295.49.

Your petitioner believes that this Honorable Court

should require the United States Circuit Court of Appeals for the Eighth Circuit to certify the said cause to it for its review and determination in conformity with the act of Congress in such cases made and provided:

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record of proceedings of the said United States Circuit Court of Appeals for the Eighth Circuit in the said case therein entitled "*Omaha Water Company, Appellant, v. The City of Omaha, Appellee*, No. 2683," to the end that the said case may be reviewed and determined by this Court, as provided in the Act of Congress entitled "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the judgment of the said United States Circuit Court of Appeals for the Eighth Circuit in the said case and every part thereof may be reversed by this Honorable Court.

Your petitioner further represents that it has filed in the Clerk's office of this Court a certified copy of the transcript of the record including all proceedings in the United States Circuit Court of Appeals, Eighth Circuit, and has filed herewith its brief in support of this petition, its motion, and notice to the adverse party, as required by the rules of procedure.

JOHN LEE WEBSTER,
CARL C. WRIGHT,
HARRY E. BURNAM,
Attorneys for Petitioner.

STATE OF NEBRASKA, }
COUNTY OF DOUGLAS. } ss.

John Lee Webster, being duly sworn, says that he is one of the counsel for The City of Omaha, petitioner, that he knows the contents of the foregoing petition and that the allegations thereof are true as he verily believes.

John Lee Webster

Subscribed and sworn to before me by John Lee Webster, this the *5th* day of *May*, 1908.

My commission expires *Sept. 26, 1908*

May H. Feuley
Notary Public.

1871

4
The Supreme Court of the United States
FILED

MAY 21 1908

RECEIVED

Supreme Court of the United States

The City of Omaha

Plaintiff

vs.

No. 100

Omaha Water Company

Defendant

AND OF THE CITY OF OMAHA, NEBRASKA, PETITIONER
FOR WRIT OF HABEAS CORPUS

vs.

John J. W. W.

John J. W. W.

John J. W. W.

Attorneys for the City of Omaha

Supreme Court of the United States.

THE CITY OF OMAHA,

Petitioner,

VS.

OMAHA WATER COMPANY,

Respondent.

**BRIEF OF THE CITY OF OMAHA IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI.**

This action is a suit in equity brought by the Omaha Water Company v. The City of Omaha to compel the city to purchase the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence for the sum of \$6,263,295.49 under a contract which the Circuit Court of Appeals has adjudged to be a public, as distinct from a private contract.

It is a matter of great public interest to the 175,000 people living in said cities and towns, and a matter which to many of them is of grave and serious concern for reasons to be stated.

It is a case which presents questions of law about which there is a serious conflict in the decisions between courts of different states, between the state and the federal courts, and between the different federal courts, as will be seen as we proceed. In one turning point in the case, the Circuit Court of Appeals between the same litigants, has handed down two opinions inconsistent with each other, one holding the contract between the city and the Water Company is a public contract, and the other holding the same contract is a private contract, and on these conflicting constructions rendered judgments against the city in each case.

A CONDENSED STATEMENT OF FACTS.

In 1880 the City of Omaha passed ordinances authorizing a contract for the construction of water works for supplying the City of Omaha with water for fire protection, and public and domestic use. The ordinance which became a part of the contract contained a clause as follows, (rec. pp. 784-790):

“Section 14.—The City of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the City Council, one by the Water Works Company, and these two to select the third, provided that nothing shall be paid for the unexpired franchise of said Company.”

Pursuant to said Section the Mayor and Council of the City of Omaha by an ordinance, approved March 2, 1903, elected to purchase the water works “as authorized and provided by Section 14 of Ordinance No. 423,” (rec. p. 179). The City of Omaha appointed an appraiser, the Water Company appointed an appraiser, and the two selected a third appraiser. The three appraisers met in the

City of Omaha July 20, 1903, (rec. p. 180), and began taking testimony in open session, (rec. pp. 149-150). The respective parties appeared by their attorneys, produced and examined witnesses and offered much evidence of a documentary character, (rec. p. 150). This manner of procedure the board continued from time to time until December 31, 1904, when the matters were argued orally and by printed briefs before the board of appraisers by the attorneys for the respective parties. At this date the board adjourned and took the valuation under advisement, (rec. pp. 151-152).

Subsequently in February, 1906, the Water Company secretly and without the knowledge of the City of Omaha, (then and there well knowing that the City of Omaha would protest against the secret and clandestine presentation of *ex parte* evidence), shipped its books of account, covering a period of ten years of its business, from Omaha to Cincinnati, Ohio, and there presented the same to the board of appraisers for their inspection and consideration, coupled with an understanding between the Water Company and the appraisers that the appraisers would secretly receive the said evidence and would refuse to disclose to the City of Omaha the nature, force or effect of the said evidence.

The city was never permitted to see the said books, although it demanded an opportunity to do so, and the city has never been advised of the contents thereof, nor to what extent the appraisers were influenced by the said books in fixing the value of the water works. It is manifest that the said books were the only source of information the appraisers had in finding the "going value" of the water works and may have had much weight in determining the cost of the construction of the works, as well as the purchase price of water pipes and pumping engines.

On the 7th day of July, 1906, the award was made fixing the value of the water works at \$6,263,295.49, which was signed by two of the appraisers, to-wit: Daniel W. Mead and G. H. Benzenberg, and which award was *not concurred* in by John W. Alvord, one of the appraisers, but who affixed to said report above his own signature, the words, "*I do not concur in above report, nor in the values as fixed therein.*"

The Omaha Water Company has extended its system of water works from the town of Florence on the north to the City of South Omaha on the south, and from East Omaha on the east to the town of Dundee on the west, and is engaged in supplying the City of Omaha and the other four named municipalities with water.

The appraisers included in their valuation the entire water works system. The City of Omaha contends that it is without corporate power to buy, or to levy a tax, or to issue bonds to pay for the outlying property. The Circuit Court held the award void and dismissed the Bill. The Circuit Court of Appeals held the award valid and directed the entry of a decree to that effect. The three primary legal questions for consideration, are:

(1) The award is void because not concurred in by the three appraisers.

(2.) The award is void on account of the misconduct of the appraisers and of the Water Company, arising out of the secret *ex parte* examination of the books of the Water Company by the appraisers in the City of Cincinnati more than a year after the public taking of testimony had been closed and case submitted.

(3) The award is void in that it includes property in outlying municipalities which the City of Omaha did not elect to buy, and which it is without corporate power to buy or to pay for.

BRIEF OF THE ARGUMENT.

I.

THE AWARD IS VOID BECAUSE NOT CONCURRED IN BY THE THREE APPRAISERS. THE ELECTION TO PURCHASE UNDER SECTION 14 OF ORDINANCE 423 CONTEMPLATED THE VALUATION TO BE ASCERTAINED BY THREE APPRAISERS, NOT BY TWO APPRAISERS.

The contract in the case at bar, by its language and by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree, whereupon for the first time, two appraisers assumed to make an award.

The law of the case is universal in both England and America that a contract worded as in the case at bar, requires the joint concurrence of all the appraisers and that an award by two is void.

The Court of Appeals disposed of this point in the case by holding that this appraisement was a matter of public concern as distinct from an appraisement under a contract, and cited in support of its conclusion the following cases: *Colombia v. Cauca Co.*, 190 U. S., 524; *Grindley v. Barker*, 1 Bos. & P., 229; *King v. Beetson*, 3 Term., 592; *Withnell v. Gartham*, 6 Term., 388; *Gas Co. v. Wheeling*, 8 W. Va., 320; *Green v. Miller*, 6 Johns, 39; *Ex Parte Rogers*, 7 Cow., 526; *Downing v. Rugar*, 21 Wend., 178; *Crocker v. Crane*, 21 Wend., 211; *People v. Nichols*, 52 N. Y., 478; *The People v. Walker*, 23 Barb., 304; *Young v. Buckingham*, 5 Ohio, 485; *Patterson v. Leavitt*, 4 Conn., 50; *Eames v. Eames*, 41 N. H., 177, 181.

No one of said cases meets the question in hand.

This court, in the Colombia case, puts stress upon the following points:

(a) That Colombia had taken over the railroad and had not offered to rescind, and was therefore not in a position to dispute the award.

(b) That the arbitration was between a sovereign state and a railroad company, declared by a law of Colombia to be a work of public utility.

(c) The Commission "had itself resolved, under the powers given to it in the agreement that a majority vote should govern" and had so acted during the whole course of its labors. The said case is, therefore, distinct from a case where the appraisers were appointed by the parties to a contract under a contractual agreement to deal with matters of business concern. The Colombia case falls within the exception to the general rule upon the proposition that it was one of international and public concern, in which not only the national government of the Republic of Colombia was interested, but in which the United States became interested and the Secretary of State appointed one of the appraisers.

The *Wheeling Gas* case is not in point for the reason that the act of the legislature of Virginia, which created the company, provided in the said act for the appointment of the appraisers in the event of the election to purchase. In that case it was not, therefore, a matter of contract between the city and the gas company, but was a matter arising only under a public law.

In any event, in the *Wheeling* case all that was said on the point was but an expression of the views of the writer of the opinion, but left the question open to future discussion, and was not the point on which the case was decided. This will be seen by what the writer of the opinion said in conclusion upon the subject; "But on account

of the seeming confusion of the authorities on the subject, and as I do not deem it material under the view I take of the award in other respects to finally determine it now, the right to reconsider and re-examine the question in a proper future case is reserved and left open."

Grindley v. Barker, 1 Bos. P., 229, was not a case of appraisers under a contract, but of "searchers" appointed under a public law to perform a public duty, to-wit: under an act of Parliament concerning tanners. They were public officers acting in the performance of a public duty and in no sense of the word were they appraisers or arbitrators.

King v. Beetson, 3 Term., 592, is a case of church wardens acting under an act of Parliament. In that case, Kenyon, chief justice, held that the statute under which they acted provided that a majority might act.

Withnell v. Gartham, 6 Term 388, is not a case of appraisal but of an appointment of a school master by the vicar and a majority of the church wardens.

Green v. Miller, 6 Johns., 39, is a case where the court held the award void because signed by four, the fifth not signing. The point ruled by the Circuit Court of Appeals is not in the case.

Ex Parte Rogers, 7 Cow., 526, is a case of damages assessed by canal commissioners, *appointed under an act of the legislature of 1825*. The commissioners are described by the court as a tribunal *appointed by law to act in a matter of public concern*. Confessedly they were acting as public officers in an official capacity. In that case the court said that in arbitration proceedings "the whole body must be unanimous."

Downing v. Bugar, 21 Wend., 178, the court stated the rule in the following language, p. 182:

"The rule seems to be well established, that in the

exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred."

The above quotation recognizes our point of contention, to-wit: that to justify an award by a majority the *authority must come from the public*. In all other cases, including those where the appraisers appointed by the parties under contract, even though acting in a public matter, all must join in the award.

Crocker v. Crane, 21 Wend., 211, is a case of commissioners appointed under an act of legislature incorporating a railroad company to receive subscriptions to the capital stock, not a case of appraisers appointed by the parties under a contract.

People v. Nichols, 52 N. Y., 478, is a case where three persons were named by an act of legislature of New York to appraise certain relics of George Washington. The Court held that a certificate by two was sufficient because they were public officers, acting under a public law, but in that case *Grover, J.*, delivered a dissenting opinion.

The People v. Walker, 23 Barb., 304, is a case of jury commissioners provided for under a statute of the state, not a case of appraisers appointed under contract, and in that case it was said that when a private authority is conferred on several all must be present and all must concur, unless provision be otherwise made.

Young v. Buckingham, 5 Ohio, 485, is a case of commissioners appointed by the court under a law of the state to condemn land for a public canal. It was held in that case that a majority of the commissioners might make an

award but because they were acting as public officers in a judicial capacity.

Patterson v. Leavitt, 4 Conn., 50, is a case where the court held the award *void* because agreed to by two, and where the third, as in the case at bar, entered his dissent in writing on the back of the submission.

Eames v. Eames, 41 N. H., 177, is a case where the court held the arbitration *void* because not concurred in by the three arbitrators.

It will be seen from this brief analysis of the cases cited by the Court of Appeals in its opinion, that the only cases wherein the courts ruled a majority might make the award, are cases where the appraisers were appointed and acting under a public law as *quasi* public officers, or appointed by governments in matters of international dispute. No one of the said cases applied the rule to arbitrators or valuers of property whose appointment is provided for under a contract and who are acting under such contract, as in the case at bar.

In the case at bar the appraisers were not appointed under ordinance 423. Said ordinance was an invitation for bids for the construction of water works to conform to the conditions and requirements of the ordinance. Bids were received and a formal written contract was entered into which by its terms made ordinance 423 a part of the contract. It was under this contract the water works were constructed and under this contract the option to purchase is reserved. Without this contract the water works would not have been constructed and no option to purchase exist. It is distinct in every sense of the word from the West Virginia and New York cases in that it arises under a contract.

Every argument stated by the Court of Appeals in its opinion to justify the award by two appraisers in the case at bar would apply with equal force to every ap-

praisement, or arbitration, or award made under a contract between individuals or corporations, yet the rule of law is universal in such cases that the award must be concurred in by all unless it is otherwise provided.

The statement by the court that it was not intended that the appraiser selected by the city or the one selected by the company might cause the appraisal to miscarry by refusal to join in the valuation found by the other two, is not justified by any language in the contract. On the other hand, we might suggest that the purpose and intention of the contract was that all three should concur in the award so as to insure a *fair* valuation and to prevent the Water Company securing an excessive and unreasonable valuation through the voice of a majority of the appraisers.

Language will be found in many of the authorities hereafter cited to the effect that the method in this case provided, to-wit: that each of the parties shall select one appraiser and these two the third, is to secure three things:

- (1) Unanimity in valuation.
- (2) A fair valuation.
- (3) That neither party shall obtain an undue advantage by the influence it may have or exercise over a mere majority.

The cases cited in the opinion of the Court of Appeals are exceptional cases to the general rule. The rule is, under provisions like that in the case at bar, that all three of the appraisers must concur in the award, otherwise it is void.

The contract was not that the city would purchase upon the valuation to be agreed on by a *majority*, nor by *two* of the appraisers. Neither is it a case where upon *disagreement* of the two that a third was to be selected, nor where a third was to be selected to act as *umpire*.

The conclusions from the terms of the contract of submission and cases supporting same are:

(a) The submission contemplated an appraisement and award by the three persons named.

(b) The fact that the third man was selected by the other two does not create an implication that two might make an award.

Willis v. Higginbotham, 61 Miss., 164.

Harris v. Denton, 39 So., 456.

Weaver v. Powel, et al., 23 Atl., 1070.

Lowe v. Brown, 22 Ohio St., 463.

Stose v. Heissler, 120 Ill., 433.

(c) The contract of submission contains no provision in direct terms or by implication for a majority award, therefore a majority award is void.

Memphis & Charleston R. Co. v. Pillow, 56 Tenn., 248.

Weaver v. Powel, et al., 23 Atl., 1070.

Lowe v. Brown, 22 Ohio St., 463.

(d) The rule of construction is that the contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all.

Richards v. Holt, et al., 61 Iowa, 529 (16 N. W., 595).

Hubbard v. Great Falls Manf. Co., 12 Atl., 878, (80 Me., 39).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Oakley v. Anderson, 93 N. C., 108.

Mackey v. Neill, 53 N. C., 214.

Anderson v. Farnham, 34 Me., 161.

Owens v. Withee, 3 Texas, 161.

(e) This is a common-law award, and the submission, Section 14 of Ordinance 423, does not contain a provision that two of the appraisers may make an award without the concurrence of the third.

The rule is general and *imperative* that all must concur in the award to render it valid, unless a contrary intention is *clearly* and *unmistakably* to be gathered from the terms of the submission.

Morse on Arbitration and Award, p. 162.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070.

Eames v. Eames, 41 Conn., 177.

Towne v. Jaquith, 6 Mass., 46.

Nettleton v. Gridley, 21 Conn., 531.

(f) All must concur in the award to make it valid unless the *parties have agreed* that it may be made by less than all.

Leavitt vs. Windsor Etc., 54 Fed., 439.

Jeffersonville R. R. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Towne v. Jaquith, 6 Mass., 46.

Byrd v. Harkrider, 108 Ind., 376.

Harryman v. Harryman, 43 Md., 140.

(g) Where the award is only signed by two and not concurred in by the third, unless there be an *agreement* by the parties that two may make the award the award will be void.

Morse on Arbitration, p. 162.

Jeffersonville R. R. Co. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Towne v. Jaquith, 6 Mass., 46.

Nettleton v. Gridley, 21 Conn., 531.

Byrd v. Harkrider, 108 Ind., 376.

Smith v. Waldon, 26 Ga., 249.

(h) The fact that each party selected an appraiser, and these two the third, does not give two the right to make an award, and an award so made is void.

Jeffersonville R. R. Co. v. Mounts, 7 Ind., 669.

Willis v. Higginbotham, 61 Miss., 164.

Patterson v. Leavitt, 4 Conn., 50.

United Kingdom, Etc. v. Houston, 1 Q. B. L.R., 567.

Conflicting decisions in the Circuit Court of Appeals.

The Circuit Court of Appeals in the case at bar, in order to justify its judgment, ruled in its opinion that the contract between the City of Omaha and the Omaha Water Company, under which the election to purchase was made and the proceedings relating thereto were had, was a matter of public concern as distinct from a business contract. It was on this theory that the Court escaped applying to the case at hand authorities which we have cited *supra*.

Omaha Water Co. v. The City of Omaha, 147 Fed., 1, is a case in which the same Court held that the same contract between the City of Omaha and the Water Company was a matter of private contract as distinct from one of public concern. That case arose under the same contract between the city and the Water Company. The City of Omaha undertook to reduce the meter rates provided for in the contract, claiming that the meter rates fixed in the contract were a privilege or immunity subject to subsequent modification, or failing that, that the said meter rates were a matter of public concern and of a public nature, and were subject to the control and modification of

the city as conditions changed, and did not constitute an irrevocable and unalterable contract. The Court of Appeals in that case held that the contract in question between the city and the Water Company was a business or proprietary contract under which the city was governed by the same rules as individuals or private corporations are governed.

The same Court now holds on the election to purchase, that the same contract between the City of Omaha and the Water Company is a public contract and of a public nature as distinct from a contract between individuals or a private corporation. Certainly the City of Omaha in dealing with the Water Company, has the right to have the contract receive the same interpretation in its different litigations with the Water Company. It cannot be that the same contract in one law suit shall be ruled to be a private contract for the purpose of nullifying the action of the city government in regulating meter rates, and in the next suit shall be held to be a public contract for the purpose of nullifying a subsequent action by the same city government.

Other cases in which the courts have held contracts of this sort to be private contracts, as distinct from public contracts, are: *Illinois Trust, Etc. v. City of Arkansas City*, 76 Fed., 271; *Wagner v. City of Rock Island*, 146 Ill., 139; *App. of Brum*, 12 Atl., 855; *Safety Insulated Wire & Cable Co. v. Mayor & City Council of Baltimore*, 66 Fed., 140; *Cincinnati v. Cameron*, 33 Ohio St., 336.

Wheeling Gas Co. v. Wheeling, 8 W. Va., 320, cited *supra*, if to be construed as holding that the arbitration is a public appraisal merely because the city is a party, is without precedent in judicial history and contrary to all authority on the point until the coming down of the opinion from the Court of Appeals in the case at bar.

A public appraisement, within the meaning of the law, is one where the appraisers or arbitrators are appointed under a state or national law and act as *quasi* public officers in the performance of a public duty.

Grindley v. Barker, 1 Bos. & Pull., 229.

King v. Beeston, 3 Term., 592.

Withnell v. Gartham, 6 Tenn., 388.

Ex Parte Rogers, 7 Cow., 525.

Sinclair v. Jackson, 8 Cow., 543.

Young v. Buckingham, 5 Ohio, 485.

State v. McMillan, 29 S. E., 540.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 B. & C., 314.

To make an appraisement a public one, as distinct from a private one, the appraisers must be appointed under and act under the authority of a general law, as *quasi* public officers.

See cases cited *supra*.

Cooley v. O'Connor, 12 Wall., 391.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 Barn. & Cress., 314.

The King v. Whitaker, 9 Barn. & Cress., 648.

People v. Walker, 23 Barb., 304.

People v. Coghill, 47 Cal., 361.

Hewitt v. Craig, 5 S. W., 280.

Where a matter is referred to arbitrators as *individuals*, there joint concurrence in the award is necessary, and the arbitration will be treated as a private, as distinct from a public proceeding.

Commonwealth ex rel. Hall v. Canal Commissioners, 9 Watts., 466.

People v. Walker, 23 Barb., 304.

The submission in the case at bar is a private con-

tract appraisement. The city in making its contract with the water company, was acting, not in its governmental capacity, but in its business capacity.

The City of Omaha v. Omaha Water Co., 147 Fed., 1.

Illinois Trust Etc. v. City of Arkansas City, 76 Fed., 271-282.

Wagner v. City of Rock Island, 146 Ill., 139-154.

Appeal of Brum, 12 Atl., 855.

Safety Ins. W. & C. Co. v. Mayor and City Council of Baltimore, 66 Fed., 140.

Cincinnati v. Cameron, 33 Ohio St., 336.

The city, by voluntarily entering into an arbitration agreement in a business of this sort, does so in its private capacity, as individuals and private corporations may do, and is bound by the same rules of procedure.

Kane v. Fond du Lac, 40 Wis., 495.

Dick v. Dummerston, 19 Vt., 362.

Hine v. Stephens, 33 Conn., 504.

Springfield v. Walker, 42 Ohio St., 543.

1 Dill. Mun. Corp., Sec. 478.

It follows that the award is void because not concurred in by all three appraisers.

It is a matter of common knowledge that water companies, and gas companies, and electric light companies, and street railway companies are "public service corporations," but the point remains that the contracts between such companies and the municipalities are to be treated as and are governed by the rules which control private contracts, and that the cities entering into contracts with these public service corporations are acting in their business or proprietary capacity.

No cases are cited in the opinion of the Circuit Court of Appeals to the point that a public service corporation

is exempt from the rules governing common law arbitration or that in such cases the majority may make an award unless it is so stipulated in the terms of submission, with the possible exception of the *Wheeling* case which we have already commented upon.

II.

THE AWARD IS VOID BECAUSE THE APPRAISERS CONCLUDED THE FORMAL HEARING OF TESTIMONY AND THE ARGUMENTS OF ATTORNEYS FOR THE RESPECTIVE PARTIES ON THE 31ST DAY OF DECEMBER, 1904, AND AFTERWARDS IN FEBRUARY, 1906. IN THE CITY OF CINCINNATI, PRIVATELY AND AGAINST THE PROTEST OF THE CITY OF OMAHA, RECEIVED AND SECRETLY EXAMINED EX PARTE, THE BOOKS OF THE WATER COMPANY, AND UNDER AN UNDERSTANDING THAT THE CITY OF OMAHA SHOULD NOT BE PERMITTED TO SEE OR KNOW THE CONTENTS OF SAID BOOKS.

The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal."

The facts of this incident are as follows:

Between the date of the organizing of the Board, July 20, 1903, and the 31st day of December, 1904, some two thousand pages of typewritten evidence was formally introduced by the respective parties, and hundreds of plans and blue prints, and several hundred pages of inventory were presented, (rec. pp. 149, 150, 151 and p. 181). The attorneys for the respective parties made their formal arguments and filed printed briefs on the 31st day of December, 1904, (rec. p. 151), and the City of Omaha then understood that the taking of testimony was concluded and the matter taken under advisement.

Subsequently a meeting of the Board was called to

be held at Cincinnati, Ohio, February 7, 1906, although two of the appraisers, Mead and Alvord, lived in Chicago, and Benzenberg lived in Milwaukee. No notice of this meeting was given to the city, but notice was given to the Water Company by means of a letter written by the chairman of the Board to the manager of the Water Company, (rec. p. 176). During the time when the formal testimony was being taken in the City of Omaha, the Water Company had expressed a willingness that the appraisers might examine the books, conditioned that the city should not be permitted to be present or to see the books examined, (rec. p. 105).

Notwithstanding the protest of the city made at that time, the manager of the Water Company, in compliance with the letter of the chairman of the Board, shipped to Cincinnati the books of the Company for the years 1896 to 1905, comprising thirty large volumes, weighing several hundred pounds, (rec. pp. 106-107).

The attorney for the city, incidentally becoming advised that the books had been shipped to Cincinnati, sent to the Board a formal protest against the *ex parte* examination of the books, (rec. pp. 161-162). When the manager of the Water Company appeared before the Board of Appraisers in Cincinnati with his books, he was presented with this letter of protest from the attorney for the city, (rec. p. 108,) and in reply thereto the manager of the Water Company stated to the Board of Appraisers that he did not see why the Board should care whether the city or any one else, protested against the examination of the books, and he refused to give his consent to the city being present, for the reason that the information contained in the books was "confidential information," and further, that the books were presented for the purpose of assisting the Board in arriving at a valuation of the water works, (rec. p. 121).

The books were then examined by the Board of Appraisers with the understanding that the Board of Appraisers would keep secret the information derived from the books, and subsequently the books were shipped to Chicago and placed in the hands of an audit company to prepare therefrom a statement for the use of the Board of Appraisers, (rec. pp. 109-110), and that the treasurer of the Water Company went to Chicago and there remained several days to give such assistance as the audit company might desire, (rec. pp. 113-114).

The information of this startling misconduct on the part of the Water Company and of the Board of Appraisers, came through the examination of the manager and treasurer of the Water Company. No apology or explanation was ever given for it. It stands in the record as a bold and successful introduction ex parte of secret evidence intended to influence the appraisers in fixing the value, and the Board of Appraisers knowingly and wilfully were parties to this misconduct, because they did it after having read the letter of protest from the attorney for the city and after a consultation with the manager of the Water Company as to the propriety of doing it.

The Circuit Court of Appeals endeavors to dispose of this objection to the award by conceding that if the appraisers were acting as arbitrators that it would vitiate the award, but whereas they were acting as appraisers or valuers of property, there was no impropriety in this misconduct. That reasoning is begging the question. Whether a board of appraisers, valuers of property or arbitrators, the rule is the same, to-wit: that they have no right to enter into any arrangement or come to any understanding with one party in interest that he may furnish secret evidence for the purpose of influencing their

judgment or affecting the value of the property, coupled with the further understanding that this secret evidence shall be clandestinely presented and that the adverse party shall not be permitted to know what it is. In this case the Board of Appraisers practically agreed with the manager of the Water Company that they would not disclose to the city the fact that they had examined the books or the contents thereof, and would thereby not give the city any opportunity to know whether the books were correct or false or to offer any counter evidence.

No court would permit an appraisement of real estate under an execution to stand, where the appraisers were guilty of such misconduct.

The present case is more aggravated because this Board of Appraisers, from July 20, 1903, to December 31, 1904, one year and a half, had openly and publicly permitted the parties to present and examine witnesses in open session, thereby giving all parties in interest to understand up to that date, that the receiving and examination of evidence was to be open and above board in the presence of the parties after giving due notice. To resort to the secret method of receiving evidence more than a year later, to-wit: February 7, 1906, was such a departure from what had gone on before as to carry on the face of it the imprint of unfairness. To our minds it was such inexcusable misconduct as vitiates the award. So far as the writer of this brief is aware, no reported case can be found in any country where the English language is spoken that justifies such conduct or sustains an award under such circumstances, prior to the handing down of the present opinion.

(a) The conclusions warranted by the reported cases are that the *ex parte* examination by the Board of Appraisers of the books of the Water Company at Cin-

cinnati and against the protest of the City of Omaha, and without giving the City of Omaha an opportunity to examine said books or to be heard, was such misconduct as makes the award void.

Emery v. Owings, 7 Gill., 448.

Bassett v. Harkness, 9 N. H., 164.

Jenkins v. Liston, 13 Grat., 535.

Rand v. Peel, 74 Miss., 305.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Warren v. Tinsley, 53 Fed., 689.

Cameron v. Castleberry, 29 Ga., 495.

Walker v. Frobisher, 6 Ves., 69.

Strong vs. Strong, 9 Cush., 560.

Hewitt v. Village of Reed City, 124 Mich., 6.

Vessel Owners' Towing Co. v. Taylor, 126 Ill., 250.

Elmendorf v. Harris, 23 Wend., 638.

Dobson v. Groves, 6 Q. B., 637.

Western Female Seminary v. Blair, 1 Dis., 370.

In re Plews and Middleton, 6 Q. B., 845.

In re Tidswell, 33 Beav., 213.

Passmore v. Pettitt, 4 Dall., 270.

Wood v. Helme, 14 R. I., 325.

Jackson v. Roane, 90 Ga., 669.

Wilkins v. Van Winkle, 78 Ga., 557.

Rosenau v. Legg, 82 Ala., 568.

Knowlton v. Mickles, 29 Barb., 465.

Sisk v. Gary, 27 Md., 401.

Cleland v. Hedley, 5 R. I., 163.

(b) The receiving of *ex parte* evidence—the books of the water company—after the public taking of evidence had been closed and arguments of attorneys made, aggravates the misconduct and the award is void.

Walker v. Frobisher, 6 Ves., 69.

Jackson v. Roane, 90 Ga., 669.

Catlett v. Dougherty, 114 Ill., 568.
Wilkins v. Van Winkle, 78 Ga., 557.
Hewitt v. Village of Reed City, 124 Mich., 6.
Rosenau v. Legg, 82 Ala., 568.
Dobson v. Groves, 6 Q. B., 637.
Knowlton v. Mickles, 29 Barb., 465.
Western Female Seminary v. Blair, 1 Dis., 370.
Sisk v. Gary, 27 Md., 401.
Cleland v. Hedley, 5 R. I., 163.
Bassett v. Harkness, 9 N. H., 164.
Rand v. Peel, 74 Miss., 305.

(c) The *ex parte* examination by arbitrators of book accounts renders the award void.

Emery v. Owings, 7 Gill., 448.
In re Tidswell, 33 Beav., 213.

Same as to newspapers containing quotations of market prices:

Wilkins v. Van Winkle, 78 Ga., 557.
Jackson v. Roane, 90 Ga., 669.
Cleland v. Hedley, 5 R. I., 163.

(d) The *ex parte* examination by arbitrators of a written paper or statement renders an award void.

Jenkins v. Liston, 13 Grat., 535.
Natl. Bank of Republic v. Darragh, 30 Hun., 29.
Hewitt v. Village of Reed City, 124 Mich., 6.
Dobson v. Groves, 6 Q. B., 637.
Passamore v. Petit, 4 Dall., 270.
Wilkins v. Van Winkle, 78 Ga., 557.

(e) The *ex parte* examination of a witness, or the receiving of a statement from a witness *ex parte* renders the award void.

Walker vs. Frobisher, 6 Ves., 69.
Vessel Owners' Towing Co. vs. Taylor, 126 Ill., 250.
Elmendorf v. Harris, 23 Wend., 628.

Dobson v. Groves, 6 Q. B., 637.

Western Female Seminary v. Blair, 1 Dis., 370.

In re Plews and Middleton, 6 Q. B., 845.

Wood v. Helme, 14 R. I., 325.

Jackson v. Roane, 90 Ga., 669.

Rosenau v. Legg, 82 Ala., 568.

Knowlton v. Mickles, 29 Barb., 465.

Sisk v. Gary, 27 Md., 401.

Rand v. Peel, 74 Miss., 305.

(f) The law and public policy require that arbitrators shall give notice to the parties of each time and place when testimony is to be received, so that they may have an opportunity to be present and heard.

Lutz v. Linthicum, 8 Peters, 165.

Emery v. Oivings, 7 Gill., 448.

Warren v. Tinsley, 53 Fed., 689.

Vessel Owners' Towing Co. v. Taylor, 126 Ill., 270.

Elmendorf v. Harris, 23 Wend., 628.

Wood v. Helme, 14 R. I., 325.

Rosenau v. Legg, 82 Ala., 568.

Bassett v. Harkness, 9 N. H., 164.

McFarland v. Mathis, 10 Ark., 560.

(g) The fact that the *ex parte* evidence may be regarded as unimportant does not militate against the rule that declares the award to be void.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Dobson v. Groves, 6 Q. B., 637.

In re Plews and Middleton, 6 Q. B., 845.

In re Tidswell, 33 Beav., 213.

(h) An award made upon *ex parte* evidence or without giving notice of time and place of hearing, is void.

Marks v. No. Pac. R. Co., 76 Fed., 941.

Slater v. La Grand Light & Power Co., 73 Pac., 738.

Falconer v. Montgomery, 4 Dall., 432.

Wood v. Helme, 14 R. I., 325.

Day v. Hammond, 15 Am. Rep., 522.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

(i) The court will not permit an inquiry into the effect of the *ex parte* evidence, but will set aside the award.

Jenkins v. Liston, 13 Grat., 535.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Cleland v. Hedley, 5 R. I., 163.

Knowlton v. Mickles, 29 Barb., 465.

(j) It is not necessary for the City of Omaha to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence.

Warren v. Tinsley, 53 Fed., 689.

Elmendorf v. Harris, 23 Wend., 628.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

Jackson v. Roane, 90 Ga., 669.

(k) The award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

Walker v. Frobisher, 6 Ves., 69.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Dobson v. Groves, 6 Q. B., 637.

Passamore v. Petitt, 4 Dall., 270.

Knowlton v. Mickles, 29 Barb., 465.

McFarland v. Mathis, 10 Ark., 560.

(l) The water company will not be heard to say that its conduct in presenting its books to the board of appraisers did not improperly influence them or produce harmful results.

Catlett v. Dougherty, 114 Ill., 568.

Ins. Co. v. Hegewald, 66 N. E., 902.

(m) An arbitrator who takes instructions from one side—as Mead did from the manager of the water company regarding the books—is in law acting corruptly.

Strong v. Strong, 9 Cush., 560.

Western Female Seminary v. Blair, 1 Disney, 370.

(n) The city, having protested against the *ex parte* examination of the books, cannot be held to have waived the misconduct.

Dobson v. Groves, 6 Q. B., 637.

III.

THE CITY OF OMAHA IS WITHOUT CORPORATE AUTHORITY TO PURCHASE, OR TO LEVY TAXES, OR ISSUE BONDS TO PAY FOR THE WATER WORKS LYING WITHIN THE CORPORATE LIMITS OF SOUTH OMAHA, EAST OMAHA, DUNDEE AND FLORENCE USED FOR THE SUPPLYING OF SAID MUNICIPALITIES WITH WATER, EXCEPT THE INTAKE, PUMPING STATION AND SETTLING BASINS IN FLORENCE, WHICH ARE APPURTENANT TO AND AN ESSENTIAL PART OF THE SYSTEM FOR SUPPLYING THE CITY OF OMAHA WITH WATER.

The election to purchase was under that clause of the contract between the city of Omaha and the Water Company, known as Section 14 of Ordinance 423, passed in 1880. (p. 2, *supra*.) At the time when the said Ordinance 423 was approved and the contract for the construction of the water works entered into, these outlying municipalities, East Omaha, South Omaha and Dundee *were not in existence*, (rec. p.—), consequently it could not have been within the contemplation of the parties at that time that the water works were to be extended into these

municipalities, nor that the city of Omaha was to buy water works in these municipalities.

The report of the engineer designing the water works, (rec. 368-384), designed a system of water works for the city of Omaha alone. The Ordinance providing for the construction of the water works confined it to the city of Omaha, (rec. p. 784), and confessedly the franchise granted by the city of Omaha to the Water Company was only for the operation of a plant for the supplying of the city of Omaha with water for fire protection, and public and domestic use. The right of the city to purchase by election and appraisalment, under Section 14 of Ordinance 423, must be confined to the water works then contracted for and within the contemplation of the parties *if the said contract and the law then in force is to govern this case.*

The Court of Appeals endeavors to escape this position by the suggestion that subsequent acts of legislature, by implication, gave the city the power to purchase these outlying properties, to-wit: the Compulsory Purchase Act of the state of Nebraska of 1903, and the proviso in Act creating the Water Board, Section 7659 and Section 7661, Cobbey's Ann. Statutes of 1905, that the Water Board might "contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or may contract, to the same end, with any person, co-partnership or corporation, supplying any such adjacent municipality with water for domestic, public or fire purposes, upon such terms and conditions as said Water Board may deem proper."

The above quotation from the Statute of 1903 said nothing about the *purchase* of water works property in said adjacent municipalities. There is a clear distinction between the power of the city of Omaha to buy water

works in adjacent municipalities and the power of the city of Omaha to enter into a contract to *deliver water* to a water works system in an adjacent municipality.

If the purchase of the water works is to be governed by the law as it existed when the contract of 1880 was entered into, then the court cannot resort to the Act of 1903 to enlarge the scope of the said contract. Upon the other hand, if the act of 1903 is to govern in any particular it must govern in all its provisions and particulars, and the said Act of 1903 referred to *supra*, gives the Water Board power "to regulate and fix the water rates—to make, modify and terminate on behalf of such city all contracts for the supply of water to such city for domestic, public or fire purposes," and the Circuit Court of Appeals held in *Omaha Water Company v. The City of Omaha*, 147 Fed., 1, that said Act did not apply to the contract between the city of Omaha and the Water Company. Furthermore, said Act of 1903 as amended in 1905 (Laws of Neb. 1905, p. 173), provided:

"Said Water Board shall have the sole power and authority—including—the acceptance or rejection of any award resulting from any such appraisal—provided, that no acceptance of any such appraisal shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisalment."

The Circuit Court of Appeals, in its opinion in this case, admits that the Water Board, under the Act quoted *supra*, rejected the award in controversy. It seems to us inconsistent for the court to say in one paragraph that the acts of the legislature subsequent to the making of the contract with the Water Company governed this case, wherein by *implication* it enlarges the power to purchase, or the scope of the purchase, or the terms of the contract relating to the election to purchase, and then in another

part of the same opinion to hold that the provision in the same law which gives the Water Board the power to reject the appraisement or the award, does not apply to the case at bar. In other words, the court cannot invoke the Act of 1903, as amended in 1905, to sustain the appraisement of the outlying properties, and then reject the same act of the legislature wherein it puts a limitation upon the appraisement and award.

Beyond the question above stated there is another point overlooked by the Court of Appeals in its opinion, to-wit: that no act of the legislature is referred to and none is found in the statute books authorizing the city of Omaha to levy a tax to pay for the outside properties or to vote for and issue bonds to pay for outlying properties. The Court of Appeals in its opinion confesses that the language of the different acts of the legislature referred to is somewhat "unhappily chosen," and only by implication and surrounding circumstances does the Court conclude that the city has the power to purchase the outlying properties. The rule of law is to the contrary, to-wit: "That such power must be given in language *explicit* and *express* or *necessarily* to be implied from other powers," and "a fair and reasonable doubt of the existence of a corporate power is fatal to its being."

Citizens St. Ry. Co. v. Detroit Ry., 171 U. S., 48-53.
Electric Light & Power Co. v. Grand Rapids, etc. Co., 32 Fed., 659.

City of Ft. Scott v. Eads Brokerage Co., 117 Fed., 51.

State v. Irey, 42 Neb., 189.

Sexon v. Kelley, 3 Neb., 107.

The power of the city to purchase the water works system is limited to that part for which the city of Omaha

has power to levy taxes to purchase; (*Sutherland-Innes Co. v. Village of Ewart*, 86 Fed., 597), and is limited by the power of the city to that part for which the city of Omaha would have power to vote an issue of bonds to pay for.

Ottawa v. Carey, 108 U. S., 121.

No statute is appealed to by our adversaries giving the city of Omaha the authority to levy a tax or to vote bonds to pay for the water works properties in South Omaha, East Omaha and Dundee.

It has many times been held that the power of a municipality to construct, maintain or operate a system of water works is confined to the limits of said municipality and to the supplying of its own people with water, and that a municipality does not have power to extend a water works system to other cities or to supply other cities with water. That rule we believe to be uniform, unless there is an express statutory provision to the contrary.

Quincy v. City of Boston, 148 Mass., 389.

City of Lawrence v. Town of Methuen, 166 Mass., 209.

City of Pittsburg v. Bruce, et al., 158 Pa. St., 174.

City of Duluth v. Duluth Gas & Water Co., 45 Minn., 210.

Town of Bristol v. Bristol & Warren Water Works, 49 Atl., 974.

It is no answer to this argument to say, as the Court of Appeals said, that the municipalities of South Omaha and Dundee would have no other source of supply of water. There is no such proof in the record. South Omaha, under the laws of Nebraska, has the corporate power to construct its own system of water works, and to take water from any point on the Missouri River, even at the same place where the city of Omaha now takes its

water, if it elects to do so. The same ten mile limit referred to by the court in its opinion as indicating that the city of Omaha has power to purchase the works in South Omaha, gives the city of South Omaha the right to go to any point on the River within the same limit to obtain water. Again the city of South Omaha could obtain water within the same limit from the Platte River, which river extends east and west through the entire length of the state and from which the interior cities along its banks obtain their water. Furthermore, the city of Omaha and the city of South Omaha would have the power to contract as between their respective municipalities for the furnishing of water by the one city to the other, under the statute as it exists today. There is, therefore, no necessity at all for putting upon the statute by implication any forced construction for the purpose of enlarging the powers of the city of Omaha to the end that the present appraisalment should be sustained.

It is the settled law of this court that it has the right to take jurisdiction of a case of this sort by writ of *certiorari* at any stage of the proceedings in the United States Circuit Court of Appeals, either before or after a judgment or decree of said court, and independent of the question whether or not a final decree has been entered.

Forsyth v. Hammond, 166 U. S., 506.

We feel that this case is one possessing features which should appeal to the conscience of the court, and that its rules of procedure should be viewed in a spirit of liberality to the end that the City of Omaha and its people shall have the judgment of this court upon the questions involved.

JOHN LEE WEBSTER,
CARL C. WRIGHT,
HARRY E. BURNAM,
Attorneys for the City of Omaha.

158.5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 100

Office Supreme Court, U. S.

FILED

Mar 15 1908

THE CITY OF OMAHA

JAMES H. McKENNEY,
Petitioner.

vs.

THE OMAHA WATER COMPANY.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD MANSFIELD.

R. S. HALL.

Of Counsel for Respondent.

Supreme Court of the United States.

THE CITY OF OMAHA,
Petitioner,

vs.

THE OMAHA WATER COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

FACTS.

This is an application by the City of Omaha to review a decision of the Circuit Court of Appeals for the Eighth Circuit, establishing an appraisal of water works, and directing the completion of their purchase, under an option exercised by the city.

By Act of the Legislature of Nebraska, approved February 27, 1879, the City of Omaha was given power to erect, construct and maintain water works, either within or without the city limits; also to contract with individuals or corporations to construct and maintain water works, upon such terms and under such regulations as might be agreed on (Record on Appeal, pages 2, 19, 764, Appendix, page 38).

Under this authority, the City of Omaha, by Ordinance No. 423, approved June 11, 1880, granted the right to any person, company, corporation or association who should erect, construct and maintain, in accordance with the report of an en-

gineer approved by the City Council, water works within and adjacent to the City of Omaha, in Douglas County, State of Nebraska, for the purpose of supplying said city and the citizens and inhabitants thereof with water for domestic, mechanical and fire purposes, and should for twenty-five years agree to supply the city with water for fire protection and other public purposes on the lowest terms, the right of way under the public streets, alleys, public squares and public places of the city, for the purpose of placing and repairing their mains, pipes and other fixtures, including fire hydrants, during the time any such person, company, corporation or association, or their assigns, should maintain and operate any such water works and while constructing the same, upon the terms and conditions mentioned in the ordinance.

The ordinance contains the following relevant provisions:

“Section 11. In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident), all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said city of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works, and property appurtenant there-

to, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in section 14 of this ordinance; Provided that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

"Section 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company and these two to select the third; Provided that nothing shall be paid for the unexpired franchise of said company."

(Record, pages 2, 20, 784, 791).

Under the offer thus made, a successful bid was made by one, Sidney E. Locke, to whom such contract for public supply was made under date of July 20, 1880 (Record, pages 2, 20, 354, 793).

The rights under this contract were subsequently assigned by Locke to the City Water Works Company of Omaha, by which corporation the works were constructed and completed to the satisfaction of the city, which accepted them September 4, 1883 (Record, pages 3, 21, 389).

The water works and all the rights of the City Water Works Company were subsequently assigned to the American Water Works Company of Illinois, which, on July 1, 1887, placed a mortgage upon the property, which was followed by a supplemental mortgage on January 16, 1889 (Record, pages 315, 340).

In 1880, the City of Omaha, contained about 30,000 inhabitants (Record, page 133). The site now occupied by the city of South Omaha was then farm land (Record, page 611).

The plant provided for by Ordinance No. 423 required the erection of a pumping station within the city limits, which became known as the Burt Street station, to be equipped with two engines with an aggregate capacity to pump 5,000,000 gallons each twenty-four hours, and the construction of a reservoir at Walnut Hill with a capacity of 10,000,000 gallons, and the construction of a distribution system equipped for public service with 250 hydrants (Record, pages 368 to 384).

Under provisions of the ordinance and contract requiring the development of the system to keep pace with the growth of the city, the principal pumping station was, between 1887 and 1889, erected at Florence on the Missouri River, some miles north of Omaha, where, in addition to a large pumping station, seven extensive settling basins were built and the river banks were strongly and permanently fortified against danger from action of the river. (Record, pages 608, 615, 626, 651 to 655, 656, 668, 694).

Florence, although at that time politically a city, was, and still is, a place of few inhabitants (Record, pages 504, 505). In connection with the establishment there of the pumping plant, certain streets were abandoned by the city for the use of the settling basins, and other concessions were made by the city by ordinances providing for the maintenance by the water company of a distribution system with hydrants for a permanent public

and private water supply (Record, pages 823 to 832).

In connection with the completion of the pumping plant at Florence, the supply main was extended to South Omaha, in which important industries were established by Omaha people as early as 1884, and which by 1886 had become an incorporated city, into which the streets of Omaha were virtually extended, with extension of street railroad tracks. In connection with this extension an additional pumping station was erected at Poppleton avenue, in the City of Omaha (Record, pages 8, 24, 134, 139, 442).

Subsequently, the water works system was extended to the lands of the East Omaha Land Company (Record, pages 6, 125, 505).

In 1889, the Village of Dundee, adjoining the City of Omaha on the west, granted to the water company the right to extend its mains and pipes through streets in that village (Record, pages 8, 26, 505).

The American Water Works Company became beset by financial difficulties, and in 1893 suit was brought for the foreclosure of its mortgages, and receivers of its property were appointed. The suit resulted, in 1896, in a foreclosure sale, at which the property was purchased by the trustee of the City Water Works Company and the rest were to be issued in part payment for the property and its subsequent enlargement and improvement (Record, pages 221, 222, 231).

For the purpose of the sale a preliminary appraisal of the cash value of the property was made by two freeholders of Douglas County, who valued the property as it then was at \$5,500,000 (Record, pages 398-402).

The Omaha Water Company authorized two mortgages to be placed on the property. One was a prior lien mortgage for not more than \$1,500,000, under which bonds to the amount of \$440,000 were to take up \$400,000 in amount of underlying bonds of the City Water Works Company and the rest were to be issued in part payment for the property and its subsequent enlargement and improvement (Record, pages 221, 222, 231).

The other was a consolidated mortgage for not more than \$6,000,000, under which bonds to the amount of \$3,600,000 were to be issued to complete payment for the property, and bonds to the amount of \$1,750,000 were to be reserved to take up the \$1,500,000 of prior lien bonds, the remaining bonds to the amount of \$650,000 to be used for the enlargement or improvement of the mortgaged property (Record, pages 243, 252).

Prior to the foreclosure sale the City of Omaha brought a suit in the United States Circuit Court for the District of Nebraska for the forfeiture of the water works system, under the provisions of Section 11 of Ordinance 423, various grounds of forfeiture being alleged. In this suit an amended bill of complaint was filed, after the property had been conveyed to the Omaha Water Company. In the bill of complaint the city alleged that all the property described in the mortgages of the American Water Works Company, then under foreclosure, including its property in Florence and South Omaha, was "absolutely essential to the operation of said water works", and claimed the power to acquire the same by proceedings in condemnation, or by proceedings under section 11 of the ordinance, and asked for a decree adjudging that

the city had a right to take immediate possession of all the tangible property of the water works plant of every kind and nature, including all the property described in the decree of foreclosure (Record, pages 763, 770, 779, 782, 340, 342, 346, 797-807, 391-397, 820).

The verified bill of complaint, although mistaken in supposing that it was proposed to remortgage the property for \$7,500,000, alleged that *"the value of said property is much greater than the sum for which the said bondholders' committee, as shown by said Exhibit F, propose to remortgage the same, namely, \$7,500,000"* (Record, page 778).

After trial a decree was entered dismissing the bill on the merits because no ground of forfeiture was proved (Record, page 29).

It was a question whether the period of twenty years, upon the expiration of which the City of Omaha would have the right to purchase the water works, ran from 1880, when Ordinance 423 was passed, or from September 4, 1883, when the works were accepted as completed. Therefore, under ordinance of January 23, 1900, the City Council authorized the submission to the electors, at a general election, the question and proposition of issuing bonds of the city in the sum of \$3,000,000 for the appropriation or purchase of water works or land therefor. The vote was taken with the result that the president of the City Council proclaimed, March 9, 1900, that the issuance of all of said bonds had been duly authorized by the required vote of the legal electors of the City of Omaha (Record, pages 194-205).

Meanwhile, and by revision of the City Charter in 1897, the mayor and council had been given

power "to erect, construct, purchase, maintain and operate * * * water works * * * either within or without the corporate limits of the city * * *, including the appropriation of private property for the public use in the construction and operation of the same" (Sec. 135), as well as power to condemn water works property, including any existing system of water works, within the city limits and within ten miles from the city (Sec. 27). Appendix, pages 39, 40, 43.

No further steps towards a purchase having been taken, the legislature of Nebraska passed an act, approved February 2, 1903, requiring the city council of any city of the metropolitan class, Omaha only being intended, that had previously voted bonds for water works, to declare that it was necessary and expedient for the city to construct or purchase a system of water works, and in case of election to purchase, that such city should acquire such water works plant either by appropriation or through the exercise of any right enuring under contract. The act also provided for a water board to exercise jurisdiction over water works, not only within the City of Omaha but within ten miles from the city limits (Record, pages 15, 29, 179). Appendix, pages 45, 46, 49, 50.

Under the Act of 1903, the Governor of Nebraska appointed a water board, the members of which organized and took upon themselves the performance of the duties mentioned in the act (Record, pages 16, 29).

On March 2, 1903, an ordinance was passed by the mayor and council of the City of Omaha, entitled "An Ordinance declaring that it is necessary and expedient for the City of Omaha to purchase the system of water works operated by the

Omaha Water Company, and providing for notification by the water board and to said water company to select one engineer as an appraiser to ascertain the value of said water works plant."

The mayor and council expressly declared "that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, * * * and do elect and determine to purchase and acquire such water works plant by virtue of the rights enuring to said city through the contract between said city and the grantors of said water company and as authorized and provided by Section 14 of the Ordinance No. 423" (Record, page 179).

Thereupon, the mayor and council selected, as one of the appraisers, for the purpose of ascertaining the valuation of said water works plant, John W. Alvord, of Chicago, an engineer of high standing and a specialist as a sanitary engineer (Record, pages 49, 51, 64, 65); and the Omaha Water Company selected, as the second appraiser for such purpose, George H. Benzenberg, of Milwaukee, holding a prominent position also in Cincinnati, an engineer in the front ranks of municipal engineers, and now president of the American Society of Civil Engineers (Record, pages 47, 50, 59, 67, 74, 76, 77); and the said Alvord and Benzenberg selected, as the third appraiser, for such purpose, Daniel W. Mead, of Madison, an eminent specialist in regard to water works, and professor of Engineering in the University of Wisconsin (Record, pages 60, 66, 69, 73, 76, 17, 29, 180).

The appraisers met at Omaha on July 20, 1903, and organized as a board by the election of Mead, as chairman, and Alvord, as secretary, and thereupon received such testimony, as was submitted

by the company and the city for the purpose of fixing the value of the water works. The course of the appraisers in general was for the water company to prepare and submit its schedules and estimates to the representatives of the city, by whom the various items of property were checked over, and upon objection to any items by the city authorities, sworn testimony in support thereof was given by the company (Record, pages 159, 167, 510, 512, 513).

At the outset, Mr. C. C. Wright, the city attorney, submitted to the board of appraisers, on behalf of the City of Omaha, a suggested outline of the plan of procedure to be followed in the appraisal of the Omaha water works. Paragraph Fourth of this outline is as follows:

"4. As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the Water Company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the Water Company, the City of Omaha suggests that this Board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the City of Omaha that it would

be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, whose judgment the question of value must be submitted upon the examination of the property."

(Record, pages 161, 162.)

At the close of a series of public hearings, at which both the city and the water company were represented by counsel, and a large amount of testimony was taken and reduced to writing, the chairman of the board made the following announcement:

"In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded as the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal to the fact that, while much work had been already done, that the work of valuation of this board as a board has only just commenced. We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence, and the arguments of counsel.

It becomes the duty of this board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded from this mass of matter, to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; that

undoubtedly much more information must be sought by the board than that already presented; and that the board will undoubtedly wish to call on the city and the company for special information as to details, the necessity for which will develop as the work proceeds.

In this connection I wish specially to call your attention to the fact that this is not a work of days or of weeks, but of months. While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection.

If there are no further matters to come before the board the board will stand adjourned. I will say in this connection that the members of the board will probably remain in Omaha over Saturday in order to collect the various exhibits and to prepare for further work."

This was near the beginning of the year 1905 (Record, pages 153 to 155, 166, 167).

On July 7, 1905, the water board and the City of Omaha filed in the Circuit Court of the United States for the District of Nebraska, a bill in equity against the three members of the board of appraisers and the Omaha Water Company, in which it was alleged that the board of appraisers were without power or authority to determine any matters of law, or to subpoena witnesses, or compel the production of books and papers in evidence, and that under the law there was no provision for any review of their award, either

by appeal or error to any of the Courts of the State of Nebraska or of the United States; and that serious differences had arisen in and before the board, involving questions of law and the construction of the contract under which the appraisalment was being made, involving the question of the powers and duties of the board under the contract; and that the members of the board were divided in their opinion upon the construction of the contract and upon the question as to what items of property should properly be included in their estimate of the value of the water works, which questions it was alleged the board was without authority to determine or adjudicate.

It was further alleged that the City of Omaha was without the power in law to purchase or operate water works outside of the city, or for the purpose of supplying any other city or its inhabitants, and that the appraisers were at variance with regard to whether or not such outside property should be included, but, unless restrained by the order of the Court, would make and return one entire award for all of the property of the Omaha Water Company, including the property outside of the city, without segregation of the separate amounts estimated.

The bill further alleged that the water company was contending that the estimate of the value of the property be appraised as of the date of the passage of Ordinance No. 5162, namely, March 2, 1903, but that if fixed at such date the estimate of value would be \$200,000 more than if found and returned as of the date of the award, or of the submission to the appraisers, to wit, January 3, 1905, but that the water board and the

city contended that the award should be made, and that the estimate of value should be fixed, either as of the date of the award, or as of said date of submission.

The bill of complaint further objected to the inclusion of various property as not necessary to the water works and claimed that, unless restrained by order of the Court, the board of appraisers would improperly return, as part of their estimate of value, a large sum on account of river protection at Florence, and include in their estimate improperly a large sum for the going value of the water works system. Thereupon prayer was made that it be decreed that the City of Omaha had no right, power or authority in law to purchase, own or operate any part of the water works system belonging to the Omaha Water Company lying outside of the City of Omaha, and that it was the duty of the appraisers to estimate the value of the water works to be purchased, as of the date when the award should be rendered, or as of the date of January 3, 1905, and not otherwise, and that they should exclude from their return consideration of the value of any pipe system or connections with the water plant situate in adjacent municipalities, and should exclude certain lands acquired for the erection of an additional reservoir and other lands, and should allow nothing for what is termed "going value", or for the increased value of the mains in the City of Omaha made necessary for the supplying of adjacent municipalities with water, and should exclude the value of the Poppleton Avenue pumping station, and the cost of extending land into the Missouri River, adjacent to the reservoirs at Florence.

Upon this bill a restraining order was granted, enjoining the appraisers, until final hearing and disposition of a motion for temporary injunction, from including in their estimate or award any amount for the properties or items objected to in the bill of complaint. (Record, pages 452, 453.)

Upon the bill and answer and return to the motion for a temporary injunction a decision was made, in accordance with which an order was entered November 29, 1905, directing the appraisers not only to make one appraisement which should include the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the City of Omaha and vicinity, but separate appraisements of its property in the adjacent municipalities, with separate findings of going value, and that the appraisers should "make and return the aforesaid values, as far as practicable under the evidence and to the best of their judgment as of the date of the award." (Record, pages 576 to 582). Thereupon, the appraisers resumed work upon the appraisement.

At a public meeting of the board of appraisers, at which counsel for the city, as well as the company, were present, counsel for the company had openly announced that all the books, vouchers and other papers of the water company were open for examination by the appraisers for their exclusive and confidential information, for the sole purpose of the appraisal. (Record, p. 757.)

Thereupon, the three appraisers went to the company's office and made a preliminary inspection of the company's books, announcing that they intended to examine them more fully later. (Record, page 123.)

On January 3, 1906, the chairman of the board of appraisers wrote to the company that the appraisers would meet in Cincinnati in February, and asked the company to send its books to that city at that time. (Record, page 176.)

On learning of this request, the city wrote a letter objecting to any examination of the books at Cincinnati by the appraisers alone. (Record, pages 191 to 193.)

The books, consisting of journals, ledgers, cash books and voucher registers of the company from 1896 to 1905, being at least thirty volumes, were sent to the appraisers at Cincinnati, and subsequently were sent to Chicago for examination by an audit company selected by the board of appraisers.

No question has been raised as to the accuracy of the books, and there is nothing in the evidence to show what use, if any, was made of their contents by the appraisers. There is no evidence or claim or suggestion that any use was made of the books to the prejudice of the city. (Record, pages 104 to 123, 149, 176, 562 to 567, 757 to 763.)

The board of appraisers made its report under date of July 7, 1906, returning their valuation as nearly as possible as of that date. The report was signed by the appraisers Mead and Benzenberg, and to the report was appended: "I do not concur in the above report, nor in the values as fixed therein. John W. Alvord." (Record, pages 178 to 186.)

It appears that all of the appraisers were present at all meetings of the board, including the meeting at which the report was signed, and took part in the examination of witnesses and in the

investigations of the property. (Record, pages 180, 181, 159 to 167.)

The board of appraisers found the value of all the property of the Omaha Water Company connected with and used in connection with its water plant in the city of Omaha and vicinity, embracing all work and material included in the plant to January 1, 1906, to be \$6,263,295.49 (Record, pages 184, 186).

At the time the appraisal was made, the system of water works operated by the Omaha Water Company embraced, besides the original pumping station and settling basins on the Missouri River at Burt Street, a re-enforcing pumping station at Walnut Hill, and a supplementary pumping station at Poppleton Avenue, within the City of Omaha, the main pumping station at Florence, with its seven settling basins, and equipped with low service and high service pumps each of a capacity to pump from the river into the basins, and from the final basins into the supply mains, as much as 20,000,000 gallons a day, and a distribution system of about 230 miles of pipe, supplying a total population of about 175,000, and with provision for fire protection through 1884 hydrants (Record, pages 8, 139, 504 to 525).

Upon ascertaining the amount of the appraisal, the water board, at a meeting held July 9, 1906, adopted resolutions reciting various claims of illegality with respect to the appraisal, and declared the report to be rejected (Record, pages 186 to 191).

On July 9, 1906, the president of the water company demanded of the mayor of the City of Omaha and the president of the water board payment of

the amount of the appraisement, and tendered a deed of the appraised property, and, upon the refusal of the mayor and of the water board to complete the purchase, filed its bill of complaint for a specific performance of the contract of purchase (Record, pages 1, 17, 40 to 43, 834).

The city filed an answer to this bill, setting up as defenses substantially the objections recited in the resolutions rejecting the appraisement. Replication was made by the company (Record, pages 19, 40).

Thereupon, testimony was taken, in the course of which the proceedings on the appraisement were put in evidence, and the various facts already recited were proved. It was proved, among other things, that at an early hearing before the board of appraisers, the chairman of the water board stated that the city, he believed, wanted to buy the entire works, and he believed that to be the opinion of nine-tenths of the city; that they wanted to purchase the entire property if they possibly could do it, and that they expected to do it (Record, page 755).

The chairman of the water board also testified that from time to time, while the appraisal was going on, he had frequent conversations with Mr. Alvord, the appraiser selected by the city, in which discussions were had with regard to values, including the value of the riprapping and the price of pipe, and the date for valuation and other matters relating to the appraisement (Record, pages 555, 559).

Upon the final hearing, a memorandum of opinion was handed down to the effect that the examination of the company's books by the appraisers,

without permitting the same to be examined by the counsel for the city "was such an irregularity as vitiates the award"; and without expressing any views of the Court upon the other questions raised and argued, except giving value, the Court directed a decree to be entered, dismissing the action (Record, pages 208, 209).

Thereupon, a decree was entered accordingly, dismissing the bill with costs (Record, page 210). Assigning errors, the water company took an appeal to the Circuit Court of Appeals for the Eighth Circuit (Record, pages 210 to 214).

The appeal was heard at the December term, 1907, before Hook and Adams, Circuit Judges, and Carland, District Judge.

The opinion of the Court, delivered by Hook, Circuit Judge, and concurred in by the other judges, was filed April 7, 1908, directing a reversal of the decree below, and remanding the cause with direction to proceed to decree, in accordance with the views expressed in the opinion. The validity of the purchase of the entire system of water works operated by the Omaha Water Company, and the validity of the appraisement were established by this decision.

Counsel for the City of Omaha has served on counsel for the respondent copies of a petition to the Supreme Court of the United States for a writ of certiorari for the review of the decision of the Circuit Court of Appeals, and copies of a brief in support of the petition, with notice of submission of the petition and brief on May 18, 1908, assigning as reasons for reversal:

First.—That the appraisal is void because not concurred in by the three appraisers.

Second.—That the appraisal is void because the books of the water company were examined by the appraisers under an understanding that the City or Omaha would not be permitted to see or know the contents of the books.

Third.—That the appraisal is void in that it includes extensions of the water works in the outlying municipalities adjacent to the City, for the sole purpose of supplying those municipalities with water.

POINT I.

The present case does not fall within any class of cases in which this Court has been known to review the judgment of a Circuit Court of Appeals by Writ of Certiorari.

In view of the statements made by the Chief Justice when the petition for a writ of certiorari in *The City of Omaha et al. v. The Omaha Water Company* was before the Court, and of the denial of the writ in that case, it is assumed that the rule repeatedly asserted by this Court will be strictly adhered to.

The City of Omaha et al. v. The Omaha Water Company, 207 U. S., 584, 585;

Forsyth v. Hammond, 166 U. S., 506;

Fields v. U. S., 205 U. S., 292.

The language of the Court in the case last cited applies in all respects to the case in which a writ of certiorari is now sought.

"In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this Court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal Courts, or between those of Federal Courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public" (p. 296).

(a) However important the present case may be to the City of Omaha, the questions involved are not questions of gravity and general importance. It is not enough that, as stated in the petition for the writ, they are "of great public interest and importance to the 175,000 people" living in that city and the adjacent municipalities. It is essential that the matter be one of general interest to the public of the nation.

It is obvious that the question as to the power of the City of Omaha to purchase and pay for so much of the system of water works it has elected to buy as lies within the bounds of adjacent municipalities, is necessarily a question of local statutory construction. It follows that this Court cannot, in this case, lay down any rule of construction that will be of general application. Every case of municipal authority to construct or purchase and operate water works must depend upon the constitution and statutes of the

State within which the municipality is located, and, where determined by the highest Court of that State, is not subject to review by this Court.

As remarked in *Missouri, Kansas, &c. Railway v. McCann*, 174 U. S., 580, 586,

“The elementary rule is that this Court accepts the interpretation of the Statute of a State, affixed to it by the Court of last resort thereof.”

And as was said in *Claiborne County v. Brooks*, 111 U. S., 400, 410,

“It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State.”

In illustration of the proposition that no rule of general application can be laid down by this Court through a review of the decision of the Circuit Court of Appeals in the present case, reference may be made to the decision in *Peabody v. Westerly Water Works*, 20 R. I., 176.

In that case, where a taxpayer of Westerly, R. I., brought suit to enjoin the purchase by that town of the plant of the water works company, located partly in that town and partly in the neighboring towns of Stonington and North Stonington, in the State of Connecticut, the Supreme Court of Rhode Island dismissed the bill, holding the purchase to be valid. It was not doubted by the Court in that case that the Town

of Westerly, under a Statute of Rhode Island, authorizing the water works company to sell, and the town to buy, all the property and rights and franchises of the company, whether situate, held, enjoyed or exercised by it within or without the State of Rhode Island, might lawfully both purchase and operate an existing system of water works, extending not only into adjacent municipalities, but into an adjacent State, without the necessity, and in the entire absence, of any concurrent action on the part of those adjacent municipalities, or the State in which they were located.

Should this Court entertain the present motion, and, on a review of the case, decide that the City of Omaha had not statutory power to complete in all respects the purchase it has undertaken to make, could that decision control the Supreme Court of Rhode Island, if a case similar to the Westerly case were to come before it? Would not the earlier decision of that Court be naturally and properly followed, uninfluenced by the decision of this Court, except as the reasoning of this Court might appear persuasive?

If, moreover, the present purchase of the system of the Omaha Water Company were to fail in consequence of such a ruling by this Court, on such a review, and a purchase of equal scope were again attempted by the City of Omaha and the same question of power were to arise in the Courts of Nebraska, in a suit by the city to compel the company to convey its entire system, wherever located, on an appraisement satisfactory to the city, would the Supreme Court of Nebraska be under any obligation to follow the decision of this Court on the subject?

If the city, in such a suit, were to claim that under Section 14 of the Ordinance of 1880, it was entitled to acquire "all the tangible property of the water works plant of every kind and nature," wherever located, which in 1896 it claimed it could acquire by forfeiture under Section 11 of the ordinance, and the Supreme Court of Nebraska were to sustain that claim, in spite of the inconsistency of the previous positions taken by the city, could this Court, upon any theory, review that determination?

Can this Court, through a review of the decision in the present case, lay down, even for the Circuit Courts of Appeal of the country, any general rule for the government or guidance of those courts on such questions of municipal authority as may hereafter arise under the statutes of the different states within their several circuits?

Must it not, therefore, be held that the principal question raised in the petition for a writ of certiorari in this case, does not fall within the category of questions of such gravity and general importance as to require review by this Court through this exceptional procedure?

(b) As there is, in point of fact, no conflict between federal and state courts, or between different federal courts of appeal, on any question involved in the present case, so there is, in fact, no conflict in the decisions of the Circuit Court of Appeals for the Eighth Circuit with respect to any such question.

In holding in *Omaha Water Company v. City of Omaha*, 147 Fed., 1, following well established precedents, that "in contracting for the construc-

tion or purchase of water works to supply itself and its inhabitants with water, a City is not exercising its governmental or legislative, but is using its business or proprietary, powers" and that "the purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the City and for its denizens" (p. 5), the Court held nothing inconsistent with the proposition that the purchase by the City of Omaha of the Omaha water works is a matter of public concern.

It is submitted that the ruling of the Court in the rates case was not, as claimed by counsel for the city in the petition for certiorari, that the contract for water supply "was a matter of private contract as distinct from one of public concern."

It is also submitted that the same Court has not, as claimed in the petition, held with regard to the election to purchase, "that the same contract between the City of Omaha and the Water Company is a public contract and of a public nature, as distinct from a contract between individuals or a private corporation."

All that was held in this regard in the rates case was that the contract under consideration was made by the city in the exercise of its business or proprietary powers, in distinction from its governmental or legislative powers.

What has been held in the specific performance suit is that the purchase of the water works under the contract is not a matter of a governmental or legislative character, but is nevertheless, from the nature of the case, a matter of public concern.

The essential distinction drawn by the Court in the specific performance suit, with respect to the power of a majority of the appraisers to make a valid appraisal, is the distinction between the submission of a question of price under a contract, or a matter in controversy, between private individuals, to three appraisers or arbitrators for appraisal or determination, and the submission of similar questions to appraisers or arbitrators in matters affecting the interests of a considerable number of persons. For, in a merely private matter, failure of the appraisal or arbitration would leave the parties where they were before, still free to contract with regard to the subject matter, or to have their differences determined by the Courts; whereas, in similar matters affecting a considerable number of persons, not parties to the contract or controversy, but members of the general public, failure of the appraisal or arbitration would leave them without power to consummate a purchase by agreement or to enforce the purchase or secure the determination of the controversy by resort to the Courts.

Hence, it has been uniformly held that, in a matter of public concern, considerations of public policy require that the decision of a majority shall control, so that the purpose of an appraisal or arbitration shall not be defeated or delayed in a case where any considerable number of the public are interested, but are without means of directly protecting their interests, or enforcing a contract which may enure to their benefit.

But it has never been held that the matter in question must be a matter of governmental or leg-

islative character, or a matter of public, as distinct from private, contract, or a matter which must concern a community as a body politic, or must concern the entire community. It is enough in every such case that the matter in question be merely a "matter of public concern," or, as said in the leading case of *Grindley v. Barker*, 1 Bos. & Pul., 229, be "in some respects of a general nature."

There is, therefore, no inconsistency whatever between the holding of the Circuit Court of Appeals in the rates case and its ruling in the specific performance suit.

In fact, the only inconsistency observable is in the position taken by the counsel for the city, who are applying for a writ of certiorari upon the ground that the questions involved in the case "are of great public interest and importance to the 175,000 people living in said cities and towns, and questions which to many of said citizens are of grave and serious concern" (Petition, page 1), to enable the counsel to argue that the purchase involved is not a matter of public concern, but of an entirely private nature, and requiring, therefore, the concurrence of all three appraisers.

The question of the validity of the appraisalment, in spite of the mere non-concurrence of the third appraiser, is neither a novel question, nor one on which there is a real diversity of opinion.

The statement in the petition, that the contract in Ordinance 423, providing for an appraisal for the purpose of a purchase, "by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that

theory until the moment that the three appraisers could not agree", is an entirely groundless assertion, if sought to be supported by evidence in the case. So far as there is any evidence of what was the understanding of the parties, it is to the effect that the city counsel of 1880, the legislature of 1903, the city counsel of 1903, and the water board must have contemplated that the exercise by the city of the option to purchase would surely result in an appraisal and municipal ownership, and that none of these bodies could ever have thought that such a result could be defeated by the refusal of one of the appraisers to concur in the appraisal. The purpose of Ordinance 423 must have been that the city would, beyond peradventure, "become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith," as certainly through an appraisal for determination of the price upon a purchase under Section 14, as through an appraisal for determination of the compensation upon a forfeiture under Section 11. (Record, pages 789, 790.) Is it conceivable that, in case a forfeiture had been decreed in 1897, and two of the three appraisers had agreed upon compensation unsatisfactory to the company, or a low appraisal had been made by Messrs. Mead and Alvord, without the concurrence of Mr. Benzenberg, in 1906, counsel for the city would have accepted the theory that consequently the forfeiture or the purchase must fail?

The statement in the petition that "the law of the case is universal in both England and America, that a contract worded as in the case at bar, requires the joint concurrence of all the apprais-

ers and that an award by two is void", can only be true of a contract which is a matter entirely of private or individual concern. Where the matter is one of public concern, the rule has always been that a decision of a majority of the appraisers is valid.

Grindley v. Barker, 1 Bos. & Pul., 229;
King v. Beetson, 3 Term., 592;
Withnell v. Gartham, 6 Term., 388;
Green v. Miller, 6 Johns., 39;
Ex parte Rogers, 7 Cowen, 526;
Sinclair v. Jackson, 8 Cow., 543;
Patterson v. Leavitt, 4 Conn., 50;
Young v. Buckingham, 5 Ohio, 485;
Eames v. Eames, 41 N. H., 177;
Phippen v. Stickney, 3 Metc., 384;
People ex rel. Washington v. Nichols, 52 N. Y., 478;
Gas Co. v. Wheeling, 8 W. Va., 320;
Colombia v. Cauca Co., 190 U. S., 524.

That the acquisition of a system of public water works by a municipality is necessarily a matter of public concern is also uniformly held by the Courts.

As said in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S., 685, "that the supply of water to a city is a public purpose cannot be doubted" (p. 689).

To the same effect are:

Minneapolis Mill Co. v. Board of Water Commrs. of St. Paul, 56 Minn., 485;

Winters v. City of Duluth, 82 Minn., 127;

Slingerland v. Newark, 54 N. J. L., 62;

Kennebec Water District v. Waterville, 96 Me., 234;

Munn v. Illinois, 94 U. S., 113;

Budd v. N. Y., 143 U. S., 517.

(c) There is no novel question involved in the methods or procedure of the appraisers in this case, nor is there anything in the circumstances of the case to make it either necessary or desirable that this Court lay down a new rule for the general guidance of appraisers.

There can be no doubt that it is the general rule in cases of arbitration, resting on a long line of decisions, that the parties to the controversy must have notice of hearings before the arbitrators, and that the witnesses must be examined under oath, unless the taking of an oath be waived, and must be examined in the presence of the parties, who have the right of cross examination; although, even in cases of arbitration, the strict rules governing the trials and decisions of Courts are not always applied.

People ex rel. Bliss v. Board of Supervisors, 15 N. Y. Supp., 748;

Hall v. Norwalk Fire Insurance Co., 57 Conn., 105.

It is equally true that there is a clear and vital distinction between an arbitration and an appraisal, and that this distinction runs through the proceedings from beginning to end; that it con-

cerns the origin and nature of the proceeding, the official character of the persons who are chosen to determine the matter submitted, the rules governing their procedure and method of determination, and the quality and effect of their decision.

This distinction is firmly established by the decisions of a number of Courts of high authority—wherever, indeed, the question appears to have been raised.

It is stated in *Fry on Specific Performance*, 2nd Edition, as follows:

“SEC. 341: The persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute; valuers to ascertain the value of the subject-matter of the sale.”

In support of this distinction, the following cases may be cited:

Eads v. Williams, 4 De Gex, Mac-Naghten & Gorden, 674;
Green & Coates Streets Pass. Ry. Co. v. Moore, 64 Pa., 79;
Kelly v. Crawford, 5 Wall. (S. C.), 785;
Palmer v. Clark, 106 Mass., 373;
James v. Schroeder, 61 Mich., 28;
Noble v. Grandin, 125 Mich., 383;
Guild v. Railroad Co., 57 Kansas, 70;
Wurster v. Armfield, 175 N. Y., 256;
Norwich Gas & Electric Co. v. The City of Norwich, 76 Conn., 565.

This distinction, and the consequently broad discretion allowed appraisers, are so well estab-

lished and so widely recognized that they were unhesitatingly announced to the Board of Appraisers at an early meeting, by the city attorney, representing the City of Omaha in the appraisal proceeding.

At that meeting, as appears from the record in the present case, Mr. Wright submitted to the appraisers a written outline of the plan of conducting the appraisal, which the city desired to have adopted. In that plan, he made the following statement, with reference to the nature of the proceeding:

“As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. As to the method of arriving at the amount and condition of the property of the water company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter. It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must

be submitted upon the examination of the property" (Record, p. 162).

Although it appears from the pleadings and so much of the proceedings in the appraisement suit as have been made a part of the record in this case, that nearly every conceivable question which could be suggested with reference to the procedure and conduct of the appraisers was raised, no doubt was expressed as regards their discretion in their methods of procedure and manner of obtaining information for the purposes of the appraisement. Only through the exigencies of litigation have counsel for the city felt compelled to change their attitude and question the methods of the appraisers, in which all of the appraisers joined and from which no prejudice whatever to the city is shown or claimed to have resulted.

There is, therefore, no doubtful question of general law or proper procedure arising in this case by reason of any conduct of the appraisers, nor is there any general principle, based upon the special circumstances of this case, which properly calls for statement or elucidation by this Court.

(d) The amount of money involved in this special case affords no ground for exceptional review through a writ of certiorari.

Except for vague charges that the appraisement is excessive, there is no basis whatever for any suggestion that there has been an overvaluation of the water works in question. In no particular is it charged that the appraisers have been biased or have reached a conclusion contrary to the facts. All that is definitely averred against the report in this regard is that outlying

properties have been improperly included and that certain pieces of real estate within the city limits are not essential to the system, and that no allowance should have been made for what is known as "going value." It is not even hinted that the city was prejudiced to any pecuniary extent by such examination as the appraisers made of the company's books. So far as that examination has been made a ground of objection to the appraisal, it has been urged by way of bare technicality. The charge is unsupported by evidence and baseless in fact, and is also a wanton insult to engineers of the highest rank in their profession that, in the language of the petition for the writ of certiorari, "the incident complained of did not give the city a square deal."

While refusing to concur in the report and valuation of the other appraisers, the third appraiser does not impeach in any respect the appraisal in which he had shared from the beginning to the end, nor criticise the estimate of any item of property.

On its face, there is nothing inordinate in a valuation of \$6,263,000 of a system of water works embracing four pumping stations, equipped with pumps capable of pumping and distributing more than 20,000,000 gallons of water daily; seven settling basins; a reservoir with a capacity of ten million gallons; a distribution system more than 230 miles in length, connecting with more than 1800 hydrants; a system supplying approximately 175,000 people with water for domestic and mechanical uses and fire protection and other public purposes. When it is considered that this system, more than ten years

ago, was valued by sworn appraisers for the purpose of sale at auction at \$5,500,000, and was then declared in a verified pleading of the City of Omaha to be worth more than \$7,500,000, and is mortgaged for nearly the amount of its present value, as found by the appraisers, it is idle to talk about an excessive valuation.

The act of 1903 was passed by the legislature of Nebraska, and the option to purchase was, in the same year, exercised by the mayor and city council of Omaha, with necessarily full knowledge of these notorious facts. The mayor and council then deliberately chose to acquire this system of water works by virtue of the right of purchase reserved by contract, involving the determination of the price by the appraisement of three engineers, instead of by appropriation under the powers granted by the city charter (Act of 1903, Sec. 3).

Because the City Council of Omaha, in 1900, saw fit to submit to the electors the question of issuing bonds to the amount of only \$3,000,000, for the purpose of acquiring the water works, is no reason for regarding double that sum as an excessive valuation. It was scarcely to be expected that the city would suggest more than a minimum price. Even the Act of 1903 recognized the improbability of any such low valuation, and expressly provided that if at any stage of the proceeding for acquisition of the water works, it should appear that the amount of bonds previously voted would be insufficient, the electors should have the opportunity to vote for the issue of enough additional bonds to complete the purchase (Act of 1903, Sec. 4, Appendix, page 46).

Therefore, in absence of any novel questions of law or need or possibility of declaring in this case

any general rule of statutory construction, there is no reason why this Court, or any Court, should undertake to review an appraisalment made by experienced engineers chosen in accordance with the terms specified by the City of Omaha in the original ordinance, and made for the purpose of a purchase resolved upon by the city in the exercise of an option which the water company was powerless to prevent.

POINT II.

The present application should not be allowed to serve the purpose of a stay of the proceedings which, by the opinion of the Court of Appeals, the Circuit Court is directed to take.

Under the circumstances the motive of delay seems more obvious than any hope on the part of counsel for the applicant that the writ of certiorari will be granted. It can scarcely be doubted that the pendency of the application will be urged, with fair prospect of success, as a reason for postponement of further proceedings. Thus the water company will continue to be unable, as it has been for the last five years, to derive full benefit of the ownership of its property, because of inability to extend and develop the works while under appraisalment, and provision for payment and possession and operation by the city will be indefinitely postponed—with a vista of fur-

ther litigation, but with real advantage to neither the water company nor the city.

POINT III.

The petition for a writ of certiorari in this case should be denied.

HOWARD MANSFIELD,
R. S. HALL,
Of Counsel for Respondent.

Appendix.

The following portions of Statutes of the State of Nebraska cited in the foregoing brief are printed for reference, under the rule:

Act of 1879.

“An Act Entitled ‘An Act to amend Section Fifteen (15) of an Act entitled “An Act to incorporate cities of the First Class,”’ approved March 28, 1873 (General Laws of 1879, p. 95).

“Be it enacted by the Legislature of the State of Nebraska:

“That Section Fifteen (15) Chapter Eight (8) of the general statutes of Nebraska, entitled ‘An act to incorporate cities of the first class,’ approved March 28, 1873, be amended so as to read as follows:

“Section 15. The mayor and council of each city created or governed by this act shall have the care, management and control of the city and its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power: * * *

“27. To erect, construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water-works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or

governed by said act shall have power to contract with and to procure individuals or incorporations to construct and maintain water-works on such terms and under such regulations as may be agreed on" (p. 99).

CHARTER OF OMAHA PRIOR TO LEGISLATION OF 1903.

"Sec. 27. The mayor and council shall have power to provide for keeping the sidewalks clean and free from obstructions and accumulations and may provide for the assessment and collections of taxes on real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalk adjacent to such real estate clean and free from obstructions and accumulations, as herein provided. To provide for the planting and protection of shade or ornamental and useful trees, and for the protection of birds, their nests and eggs. To provide for, regulate and require the numbering or renumbering of houses along public streets or avenues; to care for and control, to name and rename streets, avenues, parks and squares within the city, to provide for the opening, vacating, widening and narrowing of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law. *Provided*, That no street or avenue shall be narrowed to a width of less than sixty-six feet, except on petition of two-thirds of the owners of the lots and real estate along that portion of the street or avenue narrowed. To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, electric light plants or water works, including mains, pipe

lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they shall also have power to appropriate any water works system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any. All cities of the metropolitan class, upon condemning private property under such authority, shall cause to be recorded an accurate plat and a clear, definite description of the property so taken in the office of the register of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken."

"Sec. 101b. In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, park ways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and council a system of public parks,

parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or ground so designated, the power to appropriate lands, lots or ground for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated or purchased as hereinafter provided, assess such real estate as may be specially benefitted by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands, lots or grounds within the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise; and for the purpose of paying for and improving lands, lots or grounds purchased or appropriated for parks, parkways or boulevards the mayor and council may issue

bonds for such purpose to an amount necessary, not to exceed fifty thousand (\$50,000) dollars per year, said bonds to be designated and known as "Park Bonds, Series.....," and to be issued and used in accordance with the provisions governing the issuance of sewer, funding, and other public improvements bonds by this act contemplated. *Provided*, no such bonds shall be issued until the question of the issuing of the same has been submitted to the electors of the city at a general or special election therein, and authorized by a vote of two-thirds ($2/3$) of the electors voting on said question at such election. When improvements are made upon or in streets, or sidewalks adjacent to, and abutting upon, parks, parkways or boulevards and similar grounds in the charge control of said board of park commissioners, the cost or expense of which would otherwise be chargeable to the city, the same shall be paid from the park fund tax herein provided; and said commissioners are hereby directed to pay the cost of such improvements. Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city, and who shall be appointed by the judges of the district court of the judicial district in which such city shall be situated. 'The members of said board shall be appointed by said judges, a majority of said judges concurring, but the members of said board heretofore appointed and now acting shall hold their office for the full time for which they were appointed under the law heretofore enforced, and vacancies occurring from expiration of their term shall be filled by further appointments by said judges for the term of five years; it shall be the duty of said judges, a majority concurring, to

appoint or reappoint, one of said board each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum. It shall be the duty of said board of park commissioners to lay out, improve and beautify all lands, lots or grounds now owned, or hereafter acquired for parks, parkways or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants or laborers, that may be necessary for the proper care and maintenance of such park, parkways or boulevards, or the improvements or beautifying thereof, to the extent that funds may be provided for such purpose. The members of said board at its first meeting each year after the first Tuesday in May shall elect one of their own members as chairman of said board. Before entering upon their duties each member of said board shall take an oath to be filed with the city clerk, that he will faithfully perform the duties of his appointment and in the selection or designation of lands, lots or grounds for parks, parkway or boulevards, and in making appointments he will act for the best interests of such city and the public, and will not in any manner be actuated or influenced by personal or political motives. The members of said board shall receive no compensation and serve without cost to the city."

"Sec. 135.—The mayor and council shall have power to erect, construct, purchase, maintain and operate subways and conduits, water works, gas works and electric light plants, either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental

or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction, and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen."

LAWS OF NEBRASKA, 1903, CHAPTER 12.

A BILL FOR

An Act to provide in cities of the metropolitan class, viz.:

1. For the procedure in certain cases, by the mayor and council in the acquisition of a municipal water plant:
2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees.

3. Penalties for interference with water plant, or employees of water board in the discharge of their duties:

4. For a Water Fund, its revenues, and the disbursement and application thereof:

And amending Sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 139 and 140 of an act entitled "An Act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,' "approved March 30, 1887, and all acts amendatory thereof, being Chapter 12a of the Seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being Chapter 12a of the Tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881, (Tenth edition), with amendments 1882 to 1901, comprising all the laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, and repealing said original sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEBRASKA:

SECTION 1. (BONDS FOR CONSTRUCTION OR PURCHASE OF WATER PLANT.) In any city of the metropolitan class which has heretofore voted or

may hereafter vote bonds for the construction or purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall within thirty (30) days after the election at which such bonds are or have been voted, or in case such bonds have been heretofore voted, then within thirty (30) days after this act shall take effect, declare by ordinance that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works.

SEC. 3. (METHOD OF PURCHASING.) In case bonds are or have been heretofore voted for the purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall, beginning at the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights inuring to such city through contract or otherwise; and if at any stage of the proceedings instituted to acquire such water plant, the mayor and council shall, unduly or unreasonably delay, then and in such case, said mayor and council may be compelled to act by mandamus at suit of the water board of such city; and, further, if at any stage of the proceedings it shall be ascertained that the bonds hereafter or heretofore voted for the construction or purchase of said water plant are inadequate in amount, then, it shall be the duty of the mayor and council, and mandatory thereon, to submit to the voters of such city, in the manner prescribed by law, a proposition for the issuance of bonds in such further amount as may be necessary for the construction or purchase of such water plant, as the case may be.

SEC. 4. (APPRAISEMENT). If the method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve the appointment of one or more appraisers by the council, or by the mayor and council, then, and in such case, it shall be the duty of the mayor and council to at once notify the water board stating the number of appraisers to be appointed. Upon receipt of such notification the water board shall propose for appointment, by the council, or by the mayor and council, as the case may be, at the time of the next regular meeting of said council, the names of as many appraisers as may be indicated in said notification. And it shall be the duty of the council, or the mayor and council, as the case may be, to appoint or reject, at the time of such meeting, the appraiser or appraisers so proposed by said board. In case of rejection of all or any one of the appraisers proposed, as herein provided, it shall be the duty of the water board, at the time of every regular meeting of the council thereafter, to propose another or other appraisers for appointment, and so to continue until the full number of appraisers shall have been appointed by the council, or by the mayor and council, as the case may be. No such appraiser or appraisers shall be appointed by the council, or by the mayor and council, unless such appraiser or appraisers shall have been first proposed by said water board; neither shall any appraisement of said water plant be submitted to the people of such city for ratification or rejection unless the same shall have been, also, first approved by said board. If the method of procedure adopted by the mayor and council for the acquisition of such water plant

shall involve, by reason of contract, the appointment of any appraiser or appraisers by the corporation, partnership, or individual or individuals owning such water plant, and the said corporation, partnership, individual or individuals shall, for thirty (30) days after such appointment of an appraiser or appraisers should, under the contract, have been made, fail to appoint such appraiser or appraisers, then in such case, the water board, representing the rights of the city in the premises, shall have authority, and it shall be their duty, to bring appropriate proceedings in the district court of the county in which such city is located to compel the said owner or owners of such water plant to appoint such appraiser or appraisers, or upon their failure then so to do, to have such appraiser or appraisers appointed in their behalf by the court or judge before whom such action is brought. Such action both in the district court and in the supreme court, if such action shall be taken to the supreme court, on appeal or writ of error, shall take precedence for trial over all other cases on the dockets of such courts and be advanced for hearing as soon as at issue.

Sec. 5. (ELECTION OF WATER BOARD).—In each city of the metropolitan class owning and operating a municipal water plant, or which has heretofore voted or may hereafter vote bonds for the construction or purchase of a municipal water plant, there shall be a water board consisting of six (6), two of whom shall be elected at the time of each general state election held in the even numbered years, one from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election.

Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first board shall be appointed in such manner and for such terms as hereinafter set forth.

Sec. 6. (APPOINTMENT OF FIRST WATER BOARD).—The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years, from the first Tuesday after the first Monday of January following the general election held in the even numbered years, next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election, held in the even numbered years, next after their appointment. One member for each term herein designated, shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding election. Such appointments shall be made within thirty (30) days after the election at which bonds shall have been voted for the construction or purchase of a municipal water plant, or if such bonds have been heretofore voted, or if such city has heretofore acquired a municipal water plant, then within thirty (30) days after this act shall take effect.

SEC. 10. (POWERS OF BOARD).—The water board shall have general charge, supervision, and

control of the design, construction, operation, maintenance and extension or improvement of any water plant owned and operated by such city, including the power to purchase and contract for necessary material, labor and supplies, and this power shall not be subject to the approval or action of the mayor and city council; but no new construction or extension of such water plant shall be undertaken, involving the expenditure of more than five hundred dollars (\$500) without the approval of the mayor and council, neither shall any extension or improvement of such water plant be undertaken without the approval of said board; provided, that nothing herein contained shall be construed as prohibiting said board from preparing or providing engineering plans and specifications, for any such proposed construction, extension or improvement, or for the purpose of making any estimates which said board may deem necessary, without such approval. The authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles.

SEC. 12. (WATER RATES AND SERVICE FEES).—It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water, and all other receipts of the board from whatever source, shall be received and receipted for by the city treasurer, or by an employee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. The

water board shall have authority to make such rules and regulations for the conduct of the water plant, and the use and measurement of water supplied therefrom as it may deem proper, and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs.

SEC. 14. (INTERFERING WITH PLANT OR EMPLOYEE).—Any person who shall wilfully interfere with or obstruct an employee of the water board in the discharge of his duties, or who shall wilfully tamper with or injure such water plant, or the pipes connected therewith, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of not over one hundred dollars (\$100.00), or imprisonment in the county jail not over sixty (60) days, or both such fine and imprisonment in the discretion of the court.

SEC. 18. (WATER FUND, LEVY, ETC.).—The water fund shall consist of all moneys received on account of the water plant for water service or otherwise, together with a water tax to be levied—in lieu of the “fund for paying water rented for fire purposes and for public use”—by the mayor and council, at the same time, and as in the case of other funds provided for city purposes under the provisions of the charter of such city, the amount of said tax to be certified to the mayor and city council by the water board on or before the second Tuesday in January in each year, and not to exceed the sum of one hundred thousand dollars (\$100,000), and it shall be mandatory upon

the mayor and council to levy the same as above provided. Such fund, together with any interest received thereon, shall be used only for the purpose of paying interest on any water bonds issued by the city, the cost of operation, maintenance and extension or improvement of the water plant, and the salaries and expenses of the water board, its employees and assistants as herein provided. The balance remaining in the water fund at the end of each year shall be placed in a sinking fund, provided for the payment of any outstanding water bonds of such city, or for extraordinary improvements of the water plant.

SEC. 19 (SECTIONS AMENDED).—That sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled "An act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,' approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendment 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of

date July 1, 1901, be and the same are hereby amended to read as follows:

SEC. 135 (DUTIES OF COUNCIL).—The mayor and council shall have power to erect, construct, purchase, maintain and operate subways or conduits, water works, gas works and electric light plants either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction, and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen. (Water Board of Paramount.) Provided, that nothing in this section contained shall be so construed as to interfere with the powers, duties, authority and privileges, conferred and imposed upon the water board as prescribed by law, but in all matters relating to the purchase, construction, maintenance and manage-

ment of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

SEC. 20 (REPEALING CLAUSE).—That said sections 16, 24, 25, 29, 32, 33, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of said act entitled "An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government," and to repeal an act entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled "Cities of the Metropolitan Class," approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, Compiler of date July 1, 1901, as heretofore existing be and the same are hereby repealed.

SEC. 22 (EMERGENCY CLAUSE).—Whereas an emergency exists this act shall be of full force and effect from and after its passage and approval.

Approved February 2, 1903.

6
Office Supreme Court, U. S.
ST. LOUIS

FEB 10 1910

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

THE CITY OF OMAHA,

VS.

No. 189.

THE OMAHA WATER COMPANY.

OCTOBER TERM 1909

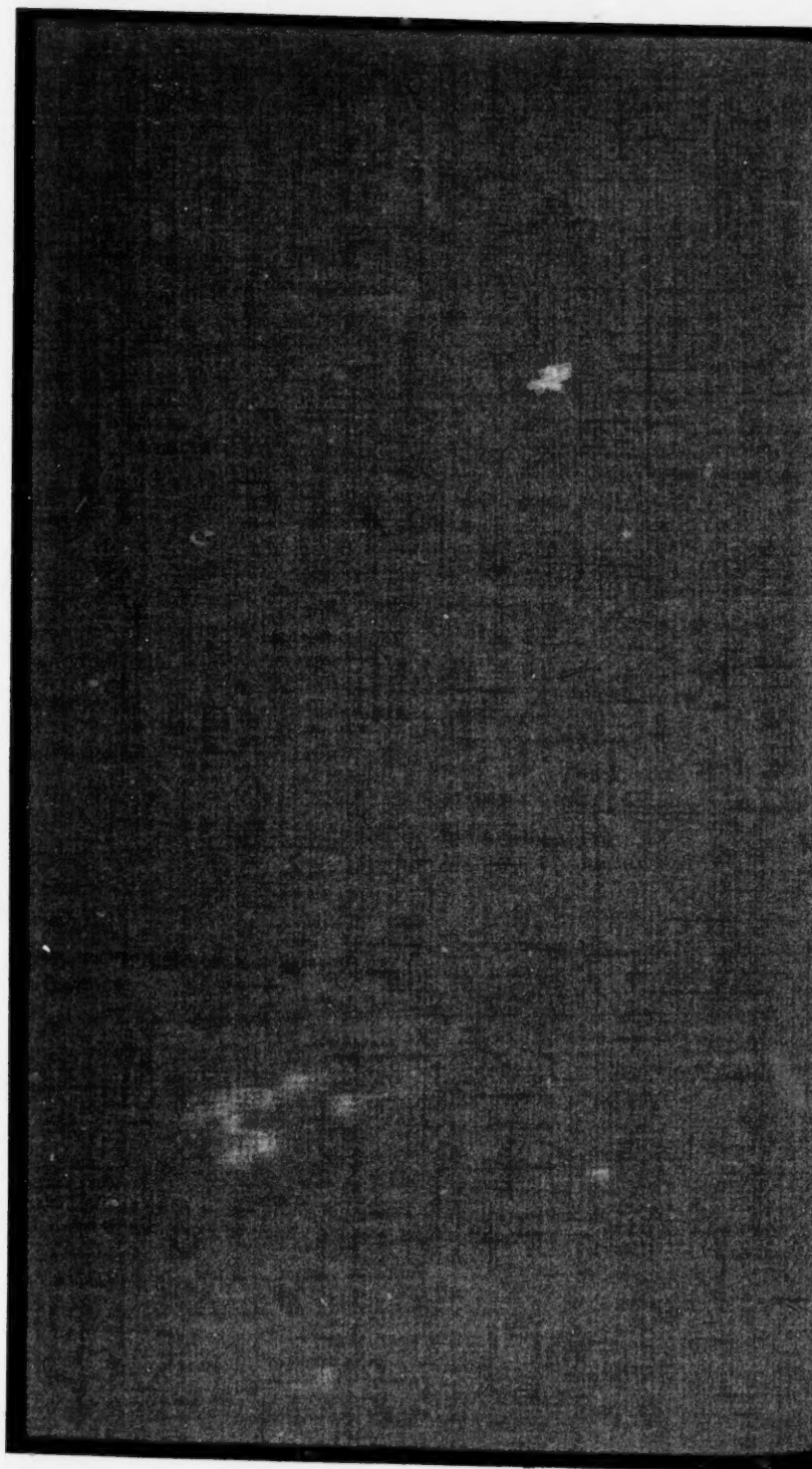
BRIEF FOR CITY OF OMAHA.

JOHN LEE WEBSTER.

CARL C. WRIGHT.

HARRY E. BURNHAM.

Solicitors for City of Omaha.



Supreme Court of the United States.

THE CITY OF OMAHA,

VS.

THE OMAHA WATER COMPANY.

} No. 159.

OCTOBER TERM 1909.

BRIEF FOR CITY OF OMAHA.

STATEMENT OF THE CASE.

This case is a suit in equity by Omaha Water Company vs. The City of Omaha to require the city to accept a deed of conveyance of the entire system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence, and pay to the Company therefor the sum of \$6,263,295.49; said sum of money being the amount of an appraisement the city insists is invalid and void.

The principal reasons why the city insists that the said appraisement is invalid and void are:

First. That the contract under which the appraisement was made required that the same should be concurred in by the three appraisers, whereas, the valuation made was concurred in by two of the appraisers and dissented from by the third appraiser.

Second. That there was misconduct on the part of the board in this: The board of appraisers held open sessions from July 20, 1903, to December 31, 1904, receiving and hearing as a judicial body, evidence tendered by the respective parties; and more than one year after the taking of evidence had been closed and the case argued by the attorneys and submitted, the said appraisers secretly and against the protest of the City of Omaha, received *ex parte* evidence tendered by Omaha Water Company and which the city was not given an opportunity to examine or to rebut.

Third. That said appraisers, without authority under the contract or warrant in law, included in the award a large sum of money for "going value."

Fourth. That said appraisers, without authority, and without warrant in law, included in said award the value of those parts of the water plant lying outside the City of Omaha and being within the limits of South Omaha, East Omaha, Dundee and Florence, and used for the supplying of the said last named municipalities with water and not necessary or incidental to the supplying of water to the City of Omaha.

In 1880 the City of Omaha passed ordinances authorizing a contract for the construction of water works for supplying the City of Omaha with water for fire protection and public and domestic use. (rec. pp. 680-686.) Ordinance No. 423, which became a part of the contract, contained the following, (rec. p. 686):

"Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided that

nothing shall be paid for the unexpired franchise of said company."

Pursuant to said section the City of Omaha, by an ordinance approved March 2, 1903, (rec. pp. 159-160) elected to purchase the water works "as authorized and provided by section 14" of ordinance No. 423, quoted *supra*. The city of Omaha appointed John W. Alvord an appraiser, the Water Company appointed G. H. Benzenberg an appraiser and the two selected Daniel W. Mead the third appraiser. The three appraisers met in the city of Omaha July 20, 1903, and organized as a board by electing Daniel W. Mead chairman and John W. Alvord secretary (rec. p. 161) and began taking testimony in open session. (rec. p. 133.) The city of Omaha appeared by its attorney, Mr. Carl C. Wright, and the Water Company appeared by its attorneys, Mr. James M. Woolworth, Mr. Howard Mansfield and Mr. R. S. Hall. Said attorneys produced and orally examined under oath a large number of witnesses. The typewritten report of the evidence so taken covered about 2,000 pages (rec. p. 161) and filled five volumes. (rec. p. 142.)

In addition to the above the parties submitted many hundreds of plans and blue prints and several hundred pages of inventory. (rec. p. 161.) This manner of taking evidence was continued by the board from time to time until December 31, 1904, (about a year and one-half), when the matters were argued orally and by printed briefs before the board of appraisers by the attorneys for the respective parties. At this date the board adjourned and took the valuation under advisement. (rec. pp. 133, 161, 491.)

Subsequently, in Feb., 1906, (a year and two months after the submission), the Water Company secretly and without the knowledge of the city of Omaha (then and

there well knowing that the city of Omaha would protest against the clandestine presentation of *ex parte* evidence) shipped its books of account, covering a period of ten years of its business, from Omaha, Neb., to Cincinnati, Ohio, and there presented the same to the board of appraisers for their investigation and consideration, coupled with an understanding between the Water Company and the appraisers that the appraisers would secretly receive the said evidence and would refuse to disclose the nature, force or effect of the said evidence. (rec. pp. 170, 93, 94, 95, 107.)

The city was not permitted to see the said books, although it demanded an opportunity to do so (rec. pp. 107, 170), and the city has never been advised of the contents thereof, nor to what extent the appraisers were influenced by the said books in fixing the value of the water works. It is manifest that the said books were the only source of information the appraisers had in finding the "going value" of the water works and may have had much weight in determining the cost of the construction of the works, as well as the purchase price of water pipes and pumping engines. (rec. p. 107.)

On the 7th day of July, 1906, the award was made fixing the value of the water works at \$6,263,295.49, which was signed by two of the appraisers, to-wit: Daniel W. Mead and G. H. Benzenberg, and which award was *not concurred* in by John W. Alvord, but who affixed to said report above his own signature, the words "*I do not concur in above report, nor in the value as fixed therein.*" (rec. pp. 159-165.)

The Omaha Water Company has extended its system of water works from the town of Florence on the north to the city of South Omaha on the south, and from East Omaha on the east to the town of Dundee on the

west, and is engaged in supplying the city of Omaha and the other four named municipalities with water.

The appraisers included in their valuation the entire water works system. (rec. pp. 159-165.) The city of Omaha contends that it is without corporate power to buy, or to levy a tax, or to issue bonds to pay for the outlying property. The Water Board of the city, by appropriate preamble and resolutions, rejected the award as illegal, null and void. (rec. pp. 166-169.) The Circuit Court held the award void and dismissed the bill. (rec. pp. 185-187.) The Circuit Court of Appeals held the award valid and directed the entry of a decree to that effect. (rec. pp. 732-746.)

ASSIGNMENT OF ERRORS.

There is error in the opinion and judgment of the Circuit Court of Appeals and of which the city of Omaha complains as follows:

First. The said court erred in holding that the report of the board of appraisers was legal and valid, notwithstanding the fact that John W. Alvord, one of the three appraisers, did not concur in the said award, whereas, said court should have held that the said award was illegal and void by reason of the fact that it was not concurred in by all of the three appraisers.

Second. The said court erred in holding that said award was of a public nature and that therefore, it was not necessary that the said award should be concurred in by the three appraisers, whereas, said court should have found and decreed that under the terms of section 14 of Ordinance No. 423, under which said appraisers were appointed and acted, that it was necessary to the

making of a valid award or appraisement that the same should have been concurred in by all three of the appraisers.

Third. The said court erred in its opinion and judgment in holding that the appraisers, after having held open sessions and received oral and documentary evidence tendered by the respective parties between July 20, 1903, and Dec. 31, 1904, and on said last date listening to the oral and receiving printed arguments of the attorneys for the respective parties and then and there taking the matter under advisement, were not guilty of misconduct which vitiated the award in thereafter secretly, and against the protest of the city of Omaha, receiving in evidence the books of account of the Omaha Water Company and without allowing the representatives of the city of Omaha an opportunity to be present or to examine the said books or to produce any explanatory or counter evidence; whereas, the said court should have held that the receiving of said *ex parte* evidence under the circumstances was such misconduct as rendered the award null and void.

Fourth. The court should have found that the conduct of the appraisers in receiving in evidence, over the protest of the city, the books of the Water Company in Feb., 1906, more than a year after the taking of evidence tendered by the respective parties had been concluded, and the matter taken under consideration, and without permitting the books to be examined by the city rendered the award null and void; and the said court should have affirmed the ruling of the Circuit Court, wherein it held that said proceeding was such an irregularity as vitiated the award.

Fifth. The said court erred in holding that the two appraisers who signed the award acted within the scope

of their powers in estimating the going value of the Omaha Water Company at the sum of \$562,712.45, and lawfully and properly including the same in their estimate of the value of the property; whereas, said court should have found that the sum estimated for going value should have been excluded from the gross amount of said award.

Sixth. The said court erred in its holding and judgment that the city of Omaha had the corporate power and authority to purchase, and that the contract between the parties, and the election to purchase both contemplated the purchase of that part of the water works system lying without the city of Omaha and within the limits of South Omaha, East Omaha, Dundee and Florence, and used for the purpose of supplying said last named municipalities with water and not necessary or incidental to the supplying of water to the city of Omaha; whereas, the court should have held that the city of Omaha was without corporate authority to purchase the said outlying properties, and that the contract between the parties and the election to purchase did not contemplate the purchase of said outlying properties.

Seventh. The court erred in its order and judgment in directing a reversal of the decree entered by the Circuit Court and should have entered an order and judgment affirming the judgment of the Circuit Court dismissing the bill of complaint of the Omaha Water Company.

BRIEF OF THE ARGUMENT.

I.

THE AWARD IS VOID BECAUSE NOT CONCURRED IN BY THE THREE APPRAISERS. THE ELECTION TO PURCHASE UNDER SECTION 14 OF ORDINANCE 423 CONTEMPLATED THE VALUATION TO BE ASCERTAINED BY THREE APPRAISERS, NOT BY TWO APPRAISERS.

"Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall *be ascertained by the estimate of three engineers*, one to be selected by the city council, one by the water works company and these two to select the third; Provided that nothing shall be paid for the unexpired franchise of said company." (rec. p. 686.)

The concluding part of the award reads as follows, (rec. p. 165):

"The valuation as made includes all schedules submitted to us of work and material included in the plant to January 1st, 1906.

Respectfully submitted,

DANIEL W. MEAD.

G. H. BENZENBERG.

"I do not concur in the above report, nor in the values as fixed therein.

JOHN W. ALVORD,

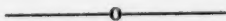
Board of Appraisers."

The contract was not that the city would purchase upon a valuation to be agreed to by a *majority*, nor by *two* of the appraisers. Neither is it a case where upon *disagreement* of the two that a third was to be selected, nor where a third was to be selected to act as umpire.

The contract in the case at bar, by its language and

by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree, whereupon for the first time, two appraisers assumed to make an award.

The law is universal in both England and America that a contract worded as in the case at bar, requires the joint concurrence of all the appraisers and that an award by two is void.



(a) The fact that each party selected an appraiser, and these two the third appraiser, does not give the right by implication or otherwise, to two appraisers to make an award, and an award so made and not concurred in by the third appraiser is void.

Willis v. Higginbotham, 61 Miss., 164.

Harvin v. Denton, 39 So., 456. (87 Miss., 238.)

Weaver v. Powel, et al., 23 Atl., 1070. (148 Pa. St., 372.)

Lowe v. Brown, 22 Ohio St., 463.

Stose v. Heissler, 120 Ill., 433.

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570.)

Memphis & Charleston Ry Co. v. Pillow, 56 Tenn., 248.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Patterson v. Leavitt, 4 Conn., 50.

United Kingdom, etc., v. Houston, 1 Q. B. L. R., 567.

Willis v. Higginbotham, 61 Miss., 164, is a case where the court held the award void because not concurred in by all the arbitrators, and said, p. 166:

"The mere selection of an odd number of arbitrators does not, we think, sufficiently indicate an agreement that a majority may make the award."

Harvin v. Denton, 87 Miss., 238, is a case where the contract was similar to the case at bar, in that it provided that each party should select an arbitrator and these two should select a third. The award was signed by two of the appraisers and it was held void because not signed by the third. The court said:

"It is perfectly manifest from the reading of this submission that all three of the arbitrators were required to investigate fully together the matters of difference, and to make together an award, and to certify and sign together said award."

Weaver v. Powel, et al., 148 Pa. St., 372, is a case where the court held the award void for similar reasons and said:

"The submission was the contract between the parties. It did not provide for a majority award, and there was nothing in it to warrant an implication that they intended to accept one in settlement of their controversy. The award was not authorized by the submission and it is therefore invalid."

Sherman v. Cobb., 15 R. I., 570, is a case where the third appraiser was selected by the other two for the purpose of appraisal of the value of property under a lease. The court said:

"Under the covenant, however, there is no agreement that the award shall be binding unless it is unanimous and therefore a mere majority award would not be binding under the covenant."

Lowe v. Brown, 22 Ohio St., 463, is a case of appraisal by appraisers under covenants in a lease which provided: "The 'ground' thus leased should be 're-valued' by three disinterested men, to be selected as fol-

lows: One by Brown, his heirs or assigns, one by the company or its assigns, and the third by the two thus chosen. It is further stipulated that 'these three persons thus chosen and appointed shall proceed to view the ground named in this indenture, and appraise the same at its true value.' " The court held the appraisement void, and said, p. 464:

"The appraisement and the written report are required to be made 'by *three* disinterested men.' The case is clearly within the rule, that, where a power or authority is intrusted to several persons to be exercised in relation to matters of a private nature, as distinguished from those of a public character, all must concur in order to its valid execution. The report, therefore, signed by two of the appraisers only, was of no validity, and was properly so regarded by the court below."

Memphis & Charleston Ry Co. v. Pillow, 56 Tenn., 248, is a case where the submission provided for three referees, each party to select one, these two to select "a third referee." Two agreed upon an award in favor of the railway company; the other referee published an award in favor of Pillow. The court, in construing the award, said, p. 250:

"By the terms of the submission, to constitute a valid award, it is essential that all the referees should unite in it. It is expressly stipulated that the three shall try the case, and that their decision shall be final, and bind the parties. It is not a case in which a majority may make a valid award, as there is no provision in the submission from which it can be inferred that it was intended that the award might be made by a majority of the whole number of arbitrators selected."

Patterson v. Leavitt, 4 Conn., 50, is a case where two signed the award and the third "entered his dissent

in writing on the back of the submission." The award was held to be void because not concurred in by all.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669, is a case of appraisal to value land taken by a railway company. The award was held void because signed by two and not concurred in by the third appraiser. The court said, p. 671:

"It has been decided that 'as a submission to arbitrators is a delegation of power for a mere private purpose, it is necessary that all the arbitrators should concur in the award, unless it is otherwise provided by the parties.' *Green v. Miller*, 6 Johns. R., 39, *Huff v. Taylor*, 2 South, 829; *Kyd. on Awards*, 106. This is a common law rule, and the act of 1849 being silent on the point of concurrence, it seems to us that that rule is applicable to the proceedings stated in the complaint."

Stose v. Heissler, 120 Ill., 433, is a case of an appraisement under a lease which provided, "Each party of the first part and second part to select one man, and the said two selected to agree upon the third party." The court held the appraisal void because not concurred in by all, and said, p. 162:

"The plaintiff contends that provision for the selection of three persons to fix the rent indicates an intention that a majority might fix the rent, otherwise an odd number would not have been agreed upon. In this respect the submission does not differ from an ordinary submission to arbitrators, and the power of the referees to make a binding award should be construed in the same way." * * * "The confidence of the parties was in the united judgment of the three, and they agreed to be bound by nothing less than their concurrent judgment."

United Kingdom Mutual S. S. Asso. v. Houston, 1 Q. B. L. R., 567, is a case where the rule provided, in case of arbitration, p. 568:

"If three arbitrators be appointed, one shall be nominated by the member making the claim, one by the committee, and the third by the two so chosen before the reference is proceeded with."

In said case the award was signed by two of the arbitrators. The third refused to sign the award. The court held the award void. The court in its opinion said, p. 570:

"I think the action cannot be maintained. For a reference to three arbitrators means that all three must concur in the making of the award. In the view I take of the meaning of the rule it is true, as Mr. Walton has pointed out, that arbitration under it can seldom have any result; for it will be rarely possible to get all three to agree in their decision. But if the parties desired to have an effective arbitration they should have framed their rule differently. The question is not what the parties might reasonably be assumed to have intended, but what they have said that they intended. Here I think the principle to be applied is exactly the same as if three persons' names had been inserted in the reference. They must all agree."



(b) The rule of construction is that the contract of submission will be construed as requiring the award to be concurred in by all the appraisers or arbitrators, unless by express words or necessary implication it authorizes an award by less than all.

Richards v. Holt, et al., 61 Ia., 529, (16 N. W., 595).

Hubbard v. Great Falls Manf. Co., 12 Atl., 878, (80 Me., 39).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Oakley v. Anderson, 93 N. C., 108.

Mackey v. Neill, 53 N. C., 214.

Anderson v. Farnham, 34 Me., 161.

Owens v. Withee, 3 Texas, 161.

Stose v. Heissler, 120 Ill., 433.

United Kingdom etc., v. Houston, 1 Q. B. L. R., 567.

Richardson v. Holt, et al., 61 Ia., 529, is a case where the contract of submission provided that "the controversy be submitted to J. W. Holland, J. S. Baker, E. H. Wilson, E. Lawrence and D. K. Douthett * * * who are hereby authorized to find the facts and conclusions of law upon the matters above set forth." "Four of the arbitrators united in an award, the other did not concur." The court held the award void, and said, pp. 533-534:

"It is a well settled rule that, unless the submission provides otherwise, or consent to a majority award is in a proper manner shown, all the arbitrators must concur in the award."

The same was announced in *Hubbard v. Great Falls Manf. Co.*, 12 Atl., 878, (80 Me., 39). In that case two signed the award; the third did not concur. The court ruled that a less number than all could not make a valid award "without any express authority given, or to be inferred from the manner or circumstances of the submission."

In *Lowe v. Brown*, 22 Ohio St., 463, the court said, p. 466:

"That instrument does not provide that the appraisalment or report may be made by a majority of the appraisers. Nor can such authority be implied from its terms as may be done in cases where two, selected to make an appraisalment, are empowered, in case of a disagreement, to call in a third."

Godfrey v. Knodle, 44 Ill., App., 638, is a case where each of the parties selected an appraiser and these two

selected a third to appraise the valuation of property under a lease. The appraisement was signed by two, the third appraiser refused to concur, and the court in speaking of it used the following language, p. 641:

“While it is true that in the absence of an agreement to accept an appraisement by a majority of the appraisers, the parties were entitled to the concurrent judgment of all three, and an appraisement by two only was not binding, yet it was optional with appellant to accept the appraisement of Judd and Wadsworth or renounce it.”

In *Oakley v. Anderson*, 93 N. C., 108, the court held an award by two was void except it be *expressly agreed* that a less number may make the award and said, p. 112:

“The submission in this case was to five persons as arbitrators, and only three concurred in making the award. In *Norfleet v. Southall*, 3 Mur., 189, it was held that when a reference is made to several persons the concurrence of all is necessary unless it is *expressly agreed* that a less number make the award; and to the same effect is *Mackey v. Neill*, 8 Jones, 214.”

In *Mackey v. Neill*, 53 N. C., 214, the court announced the same rule and said, p. 215:

“It is a well settled rule of law, that all of the arbitrators must concur in making an award, unless it is provided otherwise by the terms of the submission, by inserting, ‘Their award, or the award of any two of them, shall be binding, etc.,’ which is the usual form.”

Anderson v. Farnham, 34 Me., 161, is a case where an award was held void because not agreed to by the three referees. The court said, p. 161:

“In this case they did not choose to agree to be bound by the judgment of a simple majority of the referees. The court has no authority to change the provisions of the rule adopted by them against the consent of either party. The defendant is

entitled to the judgment of the three referees. The report is made by two only."

In *Owens v. Withee*, 3 Tex., 161, the court said, p. 166:

"If it had been intended that five should be sufficient, the agreement should so have expressed it; but the fact of the substitution of one showed a determination that the number six should be kept up according to the original agreement. The award returned is not the act and decision of the six chosen for the purpose, and, according to authorities referred to, was null and void."

For a digest of *Lowe v. Brown*, 22 Ohio St., 463, *Stose v. Heissler*, 120 Ill., 433, *United Kingdom, etc., v. Houston*, 1 Q. B. L. R., 567, reference is made to the quotations therefrom under subdivision (a) *supra*.

(c) All must concur in the award to make it valid unless the parties have agreed that it may be made by less than all. Unless there is such an agreement clearly and unmistakably expressed the award will be held void when signed by two and not concurred in by the third.

Leavitt v. Windsor, etc., 54 Fed., 439.

Harryman v. Harryman, 43 Md., 140.

Byrd v. Harkrider, 108 Ind., 376.

Willis v. Higginbotham, 61 Miss., 164.

Weaver v. Powel, et al., 23 Atl., 1070. (148 Pa. St., 372.)

Eames v. Eames, 41 Conn., 177.

Towne v. Jaquith, 6 Mass., 46.

Green v. Miller, 6 Johns., 39.

Patterson v. Leavitt, 4 Conn., 50.

Nettleton v. Gridley, 21 Conn., 531.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Smith v. Waldon, 26 Ga., 249.

Lattin v. Gamble, 154 Mich., 177-178.

In *Leavitt v. Windsor Land & Investment Co., et al.*,

54 Fed., 439, the Circuit Court of Appeals for the eighth circuit, said, p. 445:

“At common law, all those named as arbitrators must act, and they must all act together, and they must all concur in the award, unless the parties have agreed that it may be made by less than all.”

In *Harryman v. Harryman*, 43 Md., 140, the court said, p. 143:

“Apart from all other objections, as the order of reference, that being the only evidence of the submission, did not provide that a less number than the three named referees might make an award that should be binding upon the parties, the authority delegated has not been well executed. The delegation of such power is for a mere private purpose, and the authority being joint, it is necessary that all the arbitrators or referees should concur in the award, unless it be otherwise provided in the submission.”

In *Byrd v. Harkrider*, 108 Ind., 376, the court held an award void signed by two and not signed by the third arbitrator. The court said:

“The arbitration and award pleaded in this paragraph in bar of appellee’s action is a common law arbitration and award. In such an arbitration it is settled law that where, as here, the submission is to three citizens, and there is no agreement that two may act and render an award; all three of the arbitrators must meet, hear the proofs, and sign the award, to render it valid. *Jeffersonville Ry. Co. v. Mounts*, 7 Ind., 669; *Baker v. Farmbrough*, 43 Ind., 240; *Morse, Arb.*, 151-159-162.”

In *Eames v. Eames*, 41 Conn., 177, the court held an award signed by two “referees” and not signed by the third was void, and said, p. 181:

“In the case before us there is nothing to show any express or implied authority to a less number

than the whole of the referees to make a decision, but all the referees attended, considered the matters submitted to them, and united in making the award."

In *Towne v. Jaquith*, 6 Mass., 46, the court said:

"The jury have determined the fact to be, in the case at bar, that the parties, in their agreement to submit their disputes to three arbitrators, *used no expression which authorized two to decide*; and that an authority to this effect is not to be inferred from the manner or from any circumstances of the submission."

Patterson v. Leavitt, 4 Conn., 50, is a case where two arbitrators signed the award and the third, as in the case at bar, entered his dissent in writing. The award was held void. *Hosmer, Ch. J.*, said, p. 53:

"A submission to arbitration in Westminster Hall, as well as in the adjoining states of New York and Massachusetts, has been uniformly considered to be a delegation of power for a *mere private purpose*; and all the arbitrators must concur, unless it is otherwise provided by the parties."

In *Nettleton v. Gridley*, 21 Conn., 531, the court held an award void because the third arbitrator did not concur therein. The court said:

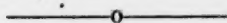
"There was no provision in the submission that any less number of arbitrators than the whole might make an award; and therefore, according to the doctrine of this court, as held in *Patterson vs. Leavitt*, 4 Conn., 50, the award published was of no effect."

In *Lattin v. Gamble*, 154 Mich., 177, the syllabus reads:

"The general rule is that where articles for a common-law arbitration by three arbitrators do not provide for an award by two of them; an award by two is not binding."

See digest of *Willis v. Higginbotham*, 61 Miss., 164,

Weaver v. Powel, et al., 148 Pa. St., 372, *Jeffersonville Ry. Co. v. Mounts*, 7 Ind., 669, under heading (a) *supra*.



(d) This case is clearly distinguishable from a case where it is provided by the terms of the submission that a third party, or umpire, is to be selected in the event of a disagreement of the other parties, for the reason that such form and terms of submission by implication clearly indicate that a unanimous award is not required and that a majority award is to be accepted. The submission in case at bar does not make the third man an umpire, neither does his appointment depend upon a disagreement between the other two.

There are cases which recognize the correctness of the rules as we have stated them in paragraphs *supra*, (a), (b) and (c), but hold that an exception exists in cases where the two appraisers selected by the parties, in the event they do not agree, are to select a third appraiser. In that situation the courts hold a third person so selected is to be treated in the character of an umpire. This distinction was ruled in *Hobson v. McArthur*, 16 Peters, 182. In that case the court said:

“A third man was not to be called in, unless the two disagreed; and it is an unreasonable construction of this agreement that it was so framed that it not only might fail to accomplish the very object intended, but that, in all probability, it must fail and become entirely nugatory, as the third man was not to be called until the two had disagreed.” * * * “It is a more reasonable construction to consider the third man in the character of an umpire to decide between the two that should disagree.”

For other similar cases see the following: *Home Ins. Co. v. S. Schiff's Sons*, 103 Md., 648, *Kilderhouse v.*

Hall, 116 Ill., 147, *Knowlton v. Homer*, 30 Me., 552, *Fish v. Vermillion*, 70 Kan., 348, *Brush v. Fisher* 70 Mich., 469.

(e) The rule which requires the concurrence of the three appraisers to a valid award, where each party selects one appraiser and the two select the third appraiser, applies with equal force to the valuers or appraisers of property as to arbitrators.

The engineers selected to ascertain the valuation of the water works, under section 14 of ordinance No. 423, in the receiving of evidence and in the making of the award, were to be governed by the same rules as govern arbitrators as set forth in the previous chapter of this brief. That is to say, in the case of appraisers or valuers of property, where each of the parties selected an appraiser and the two appraisers so selected are to choose a third, and the valuation of the property is to be ascertained by the three, an award signed by two and not concurred in by the third is void.

This is sustained by the following authorities from which excerpts have been heretofore quoted *supra*:

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570.)

Lowe v. Brown, 22 Ohio St., 463.

Jeffersonville Ry. Co. v. Mounts, 7 Ind., 669.

Stose v. Heissler, 120 Ill., 433.

Godfrey v. Knodle, 44 Ill., App., 638.

Other cases are hereafter cited under the chapter relating to the misconduct of the appraisers in receiving *ex parte* evidence where it is held that appraisers or valuers of property are governed by the same rules as govern arbitrators as to the manner of receiving evidence, giving notice of meetings, etc.

In the case at bar the appraisers, from the beginning of their proceedings, July 20, 1903, as well as the representatives of the respective parties, acted upon the theory that it would be necessary for the three appraisers to agree upon the valuation to be fixed upon the water works. At no time prior to the signing of the award, July 7, 1906, was there any suggestion by anyone that two of the appraisers could make a valid award not concurred in by the third. All parties understood that the appraised valuation should be "ascertained by the estimate of *three* engineers," not by two engineers, much less by two engineers over the protest and objection of the third engineer.

It is a matter of common knowledge that it is the prevailing custom in insurance policies and other similar contracts to make a special provision that a majority may make the award or that two appraisers may be appointed and in case of *disagreement* the two may select a third to act as *umpire*. If the city and Water Company had contemplated that an award by two would have been sufficient they could have so provided, as is frequently provided in other cases. The fact that they did not so provide emphasizes our point that the valuation was to be ascertained by the concurrent judgment of three engineers. It is no answer to say that there would be a great probability that three engineers might not agree. The parties to the contract knew of that probability as well as the court could know of it. Nevertheless, they contracted for a *joint* award. Such an award may have been contracted for because the parties wanted to be sure that neither of them should be overreached by any subtle influences that might be exercised over a mere majority.

II.

THE CASE AT BAR IS NOT A PUBLIC APPRAISEMENT WHICH WOULD JUSTIFY AN AWARD BY A MAJORITY OF THE APPRAISERS. SUCH RULE ONLY PREVAILS IN CASES OF INTERNATIONAL CONTROVERSIES, OR WHERE THE APPRAISERS ARE APPOINTED UNDER A PUBLIC LAW OF THE STATE AND ARE ACTING IN A PUBLIC OR QUASI-JUDICIAL CAPACITY.

It has been frequently ruled that contracts between cities and water companies and gas companies, etc., similar to the case at bar, are business contracts and are to be construed and dealt with as are contracts between private individuals.

Omaha Water Co. v. City of Omaha, 147 Fed., 1.

Wagner v. City of Rock Island, 146 Ill., 139.

Illinois Trust, etc., v. City of Arkansas City, 76 Fed., 271.

App. of Brum, 12 Atl., 855.

Safety Insulated Wire & Cable Co. v. Mayor and City Council, 66 Fed., 140.

Cincinnati v. Cameron, 33 Ohio St., 336.

The Court of Appeals disposed of this point in the case by holding that this appraisalment was a matter of public concern as distinct from an appraisalment under a contract, and cited in support of its conclusion the following cases: *Colombia v. Cauca Co.*, 190 U. S., 524; *Grindley v. Barker*, 1 Bos. & P., 229; *King v. Beetson*, 3 Term., 592; *Withnell v. Gartham*, 6 Term., 388; *Gas Co. v. Wheeling*, 8 W. Va., 320; *Green v. Miller*, 6 Johns., 39; *Ex parte Rogers*, 7 Cow., 526; *Downing v. Rugar*, 21 Wend., 178; *Crocker v. Crane*, 21 Wend., 211; *People v. Nichol*, 52 N. Y., 478; *The People v. Walker*, 23 Barb., 304; *Young v. Buckingham*, 5 Ohio, 485; *Patterson v.*

Leavitt, 4 Conn., 50; *Eames v. Eames*, 41 N. H., 177, 181.

No one of said cases meets the question in hand.

This court, in the Colombia case, put stress upon the following points:

(a) That Colombia had taken over the railroad and had not offered to rescind, and was therefore not in a position to dispute the award.

(b) That the arbitration was between a sovereign state and a railroad company, declared by a law of Colombia to be a work of public utility.

(c) The Commission "had itself resolved, under the powers given to it in the agreement, that a majority vote should govern," and had so acted during the whole course of its labors. The Colombia case falls within the exception to the general rule upon the proposition that it was one of international and public concern, in which not only the national government of the Republic of Colombia was interested, but in which the United States became interested and the secretary of state appointed one of the appraisers.

The said case is, therefore, distinct from a case where the appraisers were appointed by the parties to a contract under a contractual agreement to deal with matters of business concern.

The *Wheeling Gas* case is not in point for the reason that the act of the legislature of Virginia, which created the company, provided in the said act for the appointment of the appraisers in the event of the election to purchase. In that case it was not a matter of contract between the city and the gas company, but a matter arising only under a *public law*.

In any event, in the *Wheeling* case, all that was said on the point was but an expression of the views of the writer of the opinion, which left the question open to

future discussion, and was not the point on which the case was decided. This will be seen by what the writer of the opinion said in conclusion upon the subject: "But on account of the seeming confusion of the authorities on the subject, and as I do not deem it material under the view I take of the award in other respects to finally determine it now, the right to reconsider and re-examine the question in a proper future case is reserved and left open."

Grindley v. Barker, 1 Bos. & Pull., 229, was not a case of appraisers under a contract, but of "searchers" appointed under a public law to perform a public duty, to-wit: Under an act of Parliament concerning tanners. They were public officers acting in the performance of a public duty and in no sense of the word were they appraisers or arbitrators.

King v. Beetson, 3 Term., 592, is a case of church wardens acting under an act of Parliament. In that case, Kenyon, chief justice, held that the statute under which they acted provided that a majority might act.

Withnell v. Gartham, 6 Term., 388, is not a case of appraisal but of an appointment of a school master by the vicar and a majority of the church wardens.

Green v. Miller, 6 Johns., 39, is a case where the court held the award void because signed by four, the fifth not signing. The point ruled by the Circuit Court of Appeals is not in the case.

Ex Parte Rogers, 7 Cow., 526, is a case of damages assessed by canal commissioners, appointed under an act of the legislature of 1825. The commissioners are described by the court as a tribunal appointed by law to act in a matter of public concern. Confessedly they were acting as public officers in an official capacity. In that

case the court said that in arbitration proceedings "the whole body must be unanimous."

In *Downing v. Ruger*, 21 Wend., 178, the court stated the rule in the following language, p. 182:

"The rule seems to be well established, that in the exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred."

The above quotation recognizes our point of contention, to-wit: That to justify an award by a majority the *authority must come from the public*. In all other cases, including those where the appraisers appointed by the parties under contract, even though acting in a public matter, all must join in the award.

Crocker v. Crane, 21 Wend., 211, is a case of commissioners appointed under an act of legislature incorporating a railroad company to receive subscriptions to the capital stock, not a case of appraisers appointed by the parties under a contract.

People v. Nichols, 52 N. Y., 478, is a case where three persons were named by an act of the legislature of New York to appraise certain relics of George Washington. The court held that a certificate by two was sufficient because they were public officers, acting under a public law, but in that case Grover, J., delivered a dissenting opinion.

The People v. Walker, 23 Barb., 304, is a case of jury commissioners provided for under a statute of the state, not a case of appraisers appointed under contract, and in that case it was said that when private authority is

conferred on several all must be present and all must concur, unless provision be otherwise made.

Young v. Buckingham, 5 Ohio, 485, is a case of commissioners appointed by the court under a law of the state to condemn land for a public canal. It was held in that case that a majority of the commissioners might make an award but because they were acting as public officers in a judicial capacity.

Patterson v. Leavitt, 4 Conn., 50, is a case where the court held the award void because agreed to by two, and where the third, as in the case at bar, entered his dissent in writing on the back of the submission.

Eames v. Eames, 41 N. H., 177, is a case where the court held the arbitration *void* because not concurred in by the three arbitrators.

(a) A public appraisement, within the meaning of the law, is one where the appraisers or arbitrators are appointed under a state or national law and act as *quasi* public officers in the performance of a public duty.

Grindley v. Barker, 1 Bos. & Pull., 229.

King v. Beetson, 3 Term., 529.

Withnell v. Gartham, 6 Tenn., 388.

Ex Parte Rogers, 7 Cow., 525.

Sinclair v. Jackson, 8 Cow., 543.

Young v. Buckingham, 5 Ohio, 485.

State v. McMillan, 29 S. E., 540. (52 S. C., 60.)

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 B. & C., 314.

(b) To make an appraisement a public one, as distinct from a private one, the appraisers must be appointed under and act under the authority of a general law, as *quasi* public officers. See cases cited *supra*. Also the following cases:

Cooley v. O'Connor, 12 Wall., 391.

Carroll v. Alsup, 107 Tenn., 271.

Cortis v. The Kent Water Works, 7 Barn. & Cress., 314.

The King v. Whitaker, 9 Barn. & Cress., 648.

People v. Walker, 23 Barb., 304.

People v. Coghill, 47 Cal., 361.

Hewitt v. Craig, 5 S. W., 280. (9 Ky. Law Rep., 232.)

The rule is very well stated in *Cooley v. O'Connor*, 12 Wall., 391, p. 398:

"It is true that when an authority is given jointly to several persons they must generally act jointly, or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."

We are not aware of any case in which the appraisers were selected by the parties pursuant to a contract between them which rules that such an appraisal is to be regarded as a *public* appraisal in the sense and to the extent that two may make an award when the third does not concur, unless it be a case where it is so provided in the contract. All of the cases which rule the point that a majority may make the award on the ground that the appraisal is a public appraisal are cases where the appraisers were appointed under a public law of the state and were clothed with public authority, acting for the state under its authority. It is no answer to our claim to say that the Water Company is performing a *quasi* public service. That is aside from the point. The appraisers in the case at bar are not *public officers* and are not clothed with *public authority*. They were selected by the parties under the terms of a contract between the city and the Water Company to settle a business matter between them, to-wit: The ascertainment of the value of the water works.

III.

MISCONDUCT OF THE APPRAISERS.

THE AWARD IS VOID BECAUSE THE APPRAISERS CONCLUDED THE FORMAL HEARING OF TESTIMONY AND THE ARGUMENTS OF ATTORNEYS FOR THE RESPECTIVE PARTIES ON THE 31ST DAY OF DECEMBER, 1904, AND AFTERWARDS IN FEBRUARY, 1906, IN THE CITY OF CINCINNATI, PRIVATELY AND AGAINST THE PROTEST OF THE CITY OF OMAHA, RECEIVED AND SECRETLY EXAMINED, EX PARTE, THE BOOKS OF THE WATER COMPANY, AND UNDER AN UNDERSTANDING THAT THE CITY OF OMAHA SHOULD NOT BE PERMITTED TO SEE OR KNOW THE CONTENTS OF SAID BOOKS.

The question to be considered involves a moral principle. The incident complained of did not give the city a "square deal." The facts are as follows:

Between the date of the organizing of the board, July 20, 1903, and the 31st day of December, 1904, the board held many sessions in the city of Omaha, and the Water Company and the city produced witnesses before the board which were sworn and examined, and some 2,000 pages of typewritten evidence were introduced (rec. p. 161), and filled five volumes (rec. p. 142), and there were also hundreds of plans and blue prints and several hundred pages of inventory. (rec. p. 161.) The attorneys for the respective parties made their arguments, orally and by printed briefs, on the 31st day of December, 1904, and at which date the board took the valuation under advisement. (rec. pp. 133, 161, 491.)

Subsequently a meeting of the board was called to be held at Cincinnati, Ohio, February 7, 1906, (a year and two months after the submission), although two of the appraisers, Mr. Mead and Mr. Alvord, lived in Chicago,

and Mr. Benzenberg lived in Milwaukee. No notice of this meeting was given to the city, but the Water Company were advised as per the following letter, (pp. 156-157):

"Madison, Wisconsin, Jan. 3, 1906.

"Omaha Water Company, Omaha, Neb.:

"Gentlemen: I duly received the inventory recently sent; also on a previous date the blue print inventory showing additions to the system since the last schedule submitted, as well as the subdivision of the system between the various municipalities.

"I wish you would kindly send two more copies of these blue prints for use of the other appraisers. We will get along with the single copies of the inventories.

"Our next meeting will be held in Cincinnati on February 7th, 8th, 9th and 10th. We should like to have the books of the company brought to Cincinnati at that meeting. Our headquarters will be the Grand Hotel. I will advise you by wire or otherwise promptly, if any change takes place in our present arrangements.

"Yours very truly,

"(Signed)

DANIEL W. MEAD.

"Chairman Board of Appraisers, Omaha Water Works."

During the time when the parties were submitting their evidence before the board at its sessions in the city of Omaha the question arose whether the books of the Water Company should be submitted to the appraisers. Mr. C. C. Wright, in behalf of the city, demanded that if said books should be presented or examined that the city should have an opportunity to see and examine the same and objected "to the said books being presented to the appraisers unless the city, by its attorney, had an opportunity to be present and examine regarding the same."

The above facts are testified to by Mr. Fairfield, general manager of the Water Company. (rec. p. 92.)

Mr. Mead, the chairman of the board of appraisers, wrote the above letter suggesting that the Water Company send its books to the meeting to be held at Cincinnati. The manager of the Water Company sent its books, "the journals and ledgers and voucher registers for ten years from 1896 to 1905, inclusive," comprising "thirty large books," to Cincinnati. (rec. p. 94, folio 107.)

Mr. Fairfield, the manager of the company, and Mr. Heth, the treasurer of the company, went from Omaha to Cincinnati to be present at said meeting (rec. pp. 92-93) and explain the reason therefor, as follows (rec. p. 94):

"Q. And why did you and Mr. Heth go to Cincinnati? A. Because it was suggested by the board that it might help them to have someone on the spot to explain the methods of bookkeeping—save them time. Q. How was that suggested by the board? A. That was suggested in another letter from Mr. Mead."

Mr. Fairfield and Mr. Heth remained in Cincinnati over the 7th, 8th, 9th and 10th of February. The books were delivered to the board and opened and examined by the board. (rec. p. 94.) Mr. Fairfield did not give the city any notice that he had received the said letter from Mr. Mead or that he had shipped the books to Cincinnati, but he did understand that the city's objection to the *ex parte* examination of the books still held good. (rec. p. 93).

"Q. You did know, however, that Mr. C. C. Wright, representing the water board and the city of Omaha in the matter, objected to said books going before the appraisers unless he should be present or have an opportunity to examine relating thereto? A. Yes, I supposed the same objection held good."

Mr. C. C. Wright, incidentally learning that the said books had been shipped to Cincinnati, wrote a letter to the chairman of the board protesting against the receipt and examination of the books by the appraisers unless the city "should have an opportunity to be present when the books are submitted" and "be permitted to offer such testimony as it may be advised pertinent or material to the matters so contained in the said books." (rec. pp. 170-171.)

Mr. Fairfield, the manager of the Water Company, recites in his testimony that he was present before the board at their meeting in Cincinnati when the appraisers had under discussion the "method they should pursue with reference to the examination of the books" and at that time the board called his attention to the said letter of protest from the city. (rec. p. 95.)

"Q. Did you know at that time that Mr. C. C. Wright, in behalf of the water board of the city, had sent to Daniel W. Mead, as chairman of the board, a written protest against the board examining these books unless he should be present and permitted to cross examine? A. Yes, sir, they informed me to that effect. Q. That is, the board informed you? A. Yes, sir. Q. Was that information given to you at the time when you were in the room where the board met at Cincinnati, Ohio? A. Yes, as I remember it, Mr. Wright's letter was handed me to read."

The record proceeds, pp. 106-107:

"Q. Mr. Fairfield, when Mr. Daniel W. Mead of Cincinnati showed you the letter of Carl C. Wright protesting against the examination of the books by the board unless he should be present and permitted to cross-examine, what was said between you and Mr. Mead, if anything, regarding that examination of the books under the circumstances? A. Well, I think all that was said was that they had received this protest on

behalf of the city of Omaha and turned it over to me to read, and asked me what I had to say in reference to it. Q. And what did you say? A. I said in effect that I did not see why they should care whether the city or anyone else protested against the receiving of books or any other testimony if the board chose to receive it, that we had sent the books down at their request, the books were there and we were there to expedite their checking if they needed us and I assumed that they would adopt a simple method of taking the books and verifying the statements from them. I think that was about the amount of my comment."

Mr. Fairfield states that the letter was shown to him and the foregoing conversation occurred in the room in the presence of all the appraisers, and that he did not give his consent that the books should be investigated by the city or that the city's representatives should be present when the books were examined because he regarded the contents of the books as "confidential information" (rec. p. 107), but that he did understand that the books were sent to Cincinnati to aid the board in arriving at the valuation of the water works. (rec. p. 107.)

"Q. Well, you understood at the time, yourself, that the purpose of examining the books and the purpose for which they were sent to Cincinnati was to assist the board *in arriving at a valuation of the water works*? A. I assumed that it was for that purpose, yes."

After the examination of the books at Cincinnati, the books were transmitted to an auditing company in Chicago for the purpose of making a report thereon to the appraisers (rec. p. 97), and Mr. Heth, the treasurer of the Water Company, went from Cincinnati to Chicago to "give the auditors any information or help that he could in reference to checking the books." (rec. p. 9.)

Prior to said date it appears that the Water Company had also delivered "a statement from the books * * * to Mr. Mead, as chairman of the board of appraisers." (rec. p. 98.) These books which were sent by the Water Company to Cincinnati, and which were thereafter transmitted to Chicago, were books that were in the office of the Water Company at Omaha during the time when the testimony was being taken in said city, being 30 or 40 books in number. (rec. p. 99.)

Mr. Heth stated that his purpose in going to Cincinnati was "to assist, if possible," in explaining to the "appraisers" the manner of keeping the books" and "to facilitate matters if there was any occasion." (rec. p. 100).

"Q. What did Mr. Mead say to you that caused you to go to Chicago? By Mr. Hall: Objected to as hearsay and incompetent. A. Well, he stated that the books were to be placed in the hands of an auditing company for the purpose of auditing and he thought that I might be of some assistance to the audit company in stating our system of keeping books and might facilitate matters there to some extent."

While Mr. Heth was in Chicago he had two interviews with Mr. Mead "at his offices in the First National Bank Building in Chicago" relating to the said books. (rec. p. 102).

Comment. The foregoing facts are found in the evidence of Mr. Fairfield, general manager, and Mr. Heth, treasurer, of Omaha Water Company. It is perfectly manifest from said testimony that the Water Company knew that the city protested at the time of the taking of the evidence in Omaha against an *ex parte* examination of the books by the appraisers. The city did not object to the Water Company offering the books in evidence in

the same manner and form as other evidence was tendered and as other maps, plans and plats were tendered in evidence, but insisted that the city should have a right to be present if the books were offered in evidence by the Water Company. This insistence was within the legal rights of the city. It stands admitted that the board of appraisers began the taking of the testimony in open session July 20, 1903, and that course continued at the convenience of the parties until December 31, 1904. Evidence which filled five volumes containing over 2,000 pages of typewritten matter was taken and hundreds of maps, plans, plats and blue prints were offered in evidence. The witnesses were sworn examined and cross-examined by counsel. At the conclusion of the taking of the testimony the case was argued orally and by printed briefs by the several attorneys for the parties.

Now it appears that one year and two months after the formal taking of evidence had been concluded and the case submitted the Water Company shipped thirty volumes of its books from its offices in Omaha to Cincinnati, Ohio, and in said city delivered them to the appraisers for their inspection and examination. The appraisers gave no notice to the city of the meeting to be held in Cincinnati. No notice was given to the city that the books of the Water Company would be transmitted to Cincinnati for the examination of the appraisers. Why this secret proceeding? Why this departure from the method which had been pursued for a year and one-half in the manner of taking testimony? Why submit to the appraisers this "confidential information" which could bear only upon one side of the matter in controversy? Why forbid the city an opportunity to know whether these books were genuine or fabricated? Why forbid the city an opportunity to inspect, examine and produce counter

evidence if it desired? It is not to be forgotten that during the year and one-half that the appraisers were hearing evidence in Omaha these identical books were then in the adjoining building reasonably accessible. Why ship them to Cincinnati some 700 miles away and then from Cincinnati to Chicago for further examination? Why should the manager of the Water Company appear before the board of appraisers at Cincinnati when the books were being examined? Why should Mr. Heth, the treasurer of the company, hold two conferences with Mr. Mead at his private office in Chicago relating to these books? What right had the appraisers as a body to receive this *ex parte* evidence presented in this clandestine manner? What right had the officers of the Water Company to appear at Cincinnati and at Chicago to assist the appraisers in gathering information from these books? *Our insistence is that this conduct on the part of the officers of the Water Company and upon the part of the appraisers vitiated the award.*

It is not a question whether the appraisers intended to act wrongfully in receiving this *ex parte* evidence. It is not a question whether they were acting with corrupt motives or with fraudulent intent. It would be impossible for the city to prove that the board of appraisers were influenced by corrupt motives. The law steps in and declares that such conduct in and of itself vitiated the award and that it is not necessary for the city to introduce evidence showing fraudulent intent or corrupt motives. The law goes one step farther and adds that the Water Company being itself guilty of producing this *ex parte* evidence with knowledge that the city protested against it, and knowing that the appraisers made the examination of the books, notwithstanding the protest of the city, and with the understanding between the apprais-

ers and the Water Company that the information contained in the books should be strictly confidential, knowing these things and being guilty of these things *the Water Company cannot be heard in a court of equity to say that the appraisers were not improperly influenced by said evidence.*

It is no answer to our suggestion for the Water Company to say that at the time when the board organized, July 20, 1903, there may not have been an unanimity of sentiment between the board of appraisers and the attorneys for the respective parties as to the proper method of procedure or as to the powers and duties of the said board. Suffice it to say that after the board had heard the views of the respective parties in interest it was agreed between all concerned that the testimony should be taken in open session, the witnesses should be sworn and examined and cross-examined by the attorneys, and eventually, the case argued by the attorneys precisely as a case would be presented before a board of arbitrators, and *that method was pursued until December 31, 1904.* This committed everybody to that manner of procedure. From that time on all the parties were bound by it independent of the question whether it rested in consent, by agreement, or legal right. It was equally wrong and reprehensible for the Water Company to present, and for the board of appraisers to receive, this *ex parte* evidence, coupled as it was with an understanding with the board of appraisers that the city should not be permitted to be present nor to offer explanatory or counter evidence.

(a) The conclusions warranted by the reported cases are that the *ex parte* examination by the Board of Appraisers of the books of the Water Company at Cincinnati and against the protest of the City of Omaha, and

without giving the City of Omaha an opportunity to examine said books or to be heard, was such misconduct as makes the award void.

- Emery v. Owings*, 7 Gill., 448.
Bassett v. Harkness, 9 N. H. 164.
Jenkins v. Liston, 13 Grat., 535.
Rand v. Peel, 74 Miss., 305.
Natl. Bank of Republic v. Darragh, 30 Hun., 29.
Warren v. Tinsley, 53 Fed., 689.
Cameron v. Castleberry, 29 Ga., 495.
Walker v. Frobisher, 6 Ves., 69.
Strong v. Strong, 9 Cush., 560.
Hewitt v. Village of Reed City, 124 Mich., 6.
Vessel Owners' Towing Co. v. Taylor, 126 Ill., 250.
Elmendorf v. Harris, 23 Wend., 638.
Dobson v. Groves, 6 Q. B., 637.
Western Female Seminary v. Blair, 1 Dis., 370.
In re Plews and Middleton, 6 Q. B., 845.
In re Tidswell, 33 Beav., 213.
Passmore v. Pettit, 4 Dall., 270.
Wood v. Helme, 14 R. I., 325.
Jackson v. Roane, 90 Ga., 669.
Wilkins v. Van Winkle, 78 Ga., 557.
Rosenau v. Legg, 82 Ala., 568.
Knowlton v. Mickles, 29 Barb., 465.
Sisk v. Gary, 27 Md., 401.
Cleland v. Hedley, 5 R. I., 163.
Lattin v. Gamble, 154 Mich., 177-181.
Lutz v. Linthicum, 8 Peters, 165.
McFarland v. Mathis, 10 Ark., 560.
Eastern Counties Ry. Co. v. Eastern Union Ry. Co.,
 68 Eng. Ch., 609.

Emery v. Owings, 7 Gill., 448, is a case in point on the facts. Arbitrators were appointed under a clause

in a contract to appraise the cost of construction of a private road and, among other things, examined *ex parte* books of account. The court held the award void on account of this misconduct of the arbitrators, and said:

“Again the conduct of the arbitrators in examining the books of Emery & Gault, without notice to and in the absence of the respondents, and without proof of the correctness of the statements and entries in those books, was conduct so inconsistent with all the principles of law recognized in the impartial administration of justice as would vitiate and render null and void their award.”

Jackson v. Roane, 90 Ga., 669, is a case where the arbitrators heard evidence offered by the respective parties and closed the hearing. Subsequently the arbitrators received evidence offered by one party without notice to the other party. The court held the award to be void without proof on the part of the defendant that he was injured thereby.

“In this exception it was complained that the award was illegal because of the improper conduct of the arbitrators in bringing before themselves one Vickers, after the testimony on both sides was closed, and taking his *ex parte* statement in the case, without notice to Roane or his counsel, and without affording them an opportunity to examine him.”

To the point that this misconduct on the part of the arbitrators rendered the award void, the court said:

“Misconduct of the kind here shown is of itself a sufficient ground for setting aside the award, and this is so whether fraud is charged or not.”
* * * “Certainly the complaining party, after showing these facts, will not be required to go further and probe the mind of each arbitrator, and show that the testimony thus improperly received operated against him in the making up of the awards. It was incumbent

rather upon the party who procured its introduction to show, if he could, that it was harmless."

In *Dobson v. Groves*, 6 Q. B., 637, Lord Denman, C. J., said, p. 648:

"But, where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was irregular is past. The mischief was done at the time, and cannot be removed."

All of the cases cited *supra* under (a) are in harmony with the excerpts quoted and for like reasons ruled the award to be void.



(b) The receiving of *ex parte* evidence—the books of the Water Company—after the public taking of evidence had been closed and arguments of attorneys made, aggravates the misconduct and the award is void.

Walker v. Frobisher, 6 Ves., 69.

Jackson v. Roane, 90 Ga., 669.

Catlett v. Dougherty, 114 Ill., 568.

Wilkins v. Van Winkle, 78 Ga., 557.

Hewitt v. Village of Reed City, 124 Mich., 6.

Rosenau v. Legg, 82 Ala., 568.

Dobson v. Groves, 6 Q. B., 637.

Knowlton v. Mickles, 29 Barb., 465.

Western Female Seminary v. Blair, 1 Dis., 370.

Sisk v. Gary, 27 Md., 401.

Cleland v. Hedley, 5 R. I., 163.

Bassett v. Harkness, 9 N. H., 164.

Rand v. Peel, 74 Miss., 305.

Walker v. Frobisher, 6 Ves., 69, is in point. In that case "several witnesses had been examined on both sides in the presence of the parties or their attorneys." At

a later day "three persons attended on the part of the defendant; and the arbitrator examined those three persons," the plaintiff not being represented. The Lord Chancellor said, p. 71:

"This award cannot be supported. The arbitrator, having been named by the late Lord Chancellor, is, I am well assured, a *most respectable man*; but he has been surprised into a conduct, which upon general principles must be fatal to the award." * * * "He had examined different witnesses at different times in the presence of the parties." * * * "After this he hears these other persons, and he admits he took minutes of what was said. It did not pass as mere conversation. It does not appear that he afterwards held any communication with the other party or disclosed what was passed to him; but the arbitrator swears, it had no effect upon his award. I believe him. He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles."

Knowlton v. Mickles, 29 Barb., 465, is a case where the appraisers of damages to certain premises made an examination of the premises in dispute in the absence of the defendant, and then called before them two persons from whom they listened to *ex parte* statements of their knowledge of the damage to the premises. The court held the award void, and said:

"In the present case, the statements of *Van Wart and Cypher* were called for by the arbitrators themselves, and were given at their request, in the presence of the plaintiff. This is quite as strong a circumstance to show that the information acquired was considered material, and not to be mere conversation, as if such information had been reduced to writing." * * * "It has been said by many of the judges that it is impossible for the courts, or even for arbitrators themselves, to say what influence such state-

ments may have had upon them. We must go upon the general rule which condemns such a practice."

Sisk v. Gary, 27 Md., 401, is a case where the arbitrators received an *ex parte* statement after the hearing had been closed. The court said, p. 419:

"Where, after the hearing was closed, the arbitrators received a statement from one of the parties, containing new and different items of claim from any presented at the hearing and without the knowledge of the other party, a Court of Equity will enjoin a suit at law upon, and set aside the award. 2 *Story Eq.*, 1452-3, and authorities there cited."

The three cases quoted from are in harmony with all the cases cited *supra* under (b).



(c) The court will not permit an inquiry into the effect of the *ex parte* evidence, but will set aside the award.

Jenkins v. Liston, 13 Grat., 535.

Catlett v. Dougherty, 114 Ill., 568.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Cleland v. Hedley, 5 R. I., 163.

Knowlton v. Mickles, 29 Barb., 465.

In *Jenkins v. Liston*, 13 Grat., 535, the court said, pp. 538-539:

"It may therefore be safely declared that an award cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such." * * * "*The law in its jealousy will not permit an inquiry into the effect of the evidence so received; it tends to partiality*

and corruption, and nothing less than the complete vacation of the award will satisfy the law."

In *Hewitt v. Village of Reed City*, 124 Mich., 6, Montgomery, C. J., said:

"The rule is very strict in excluding any communication to an arbitrator, made *ex parte* after the case is submitted; and when such communication, which may affect the result, is made, it is *not usual to enter into an inquiry as to whether the arbitrator was in fact influenced by it or not.* *Walker v. Frobisher*, 6 Ves., 70; *Strong v. Strong*, 9 Cush., 560; *Catlett v. Dougherty*, 114 Ill., 568 (2 N. E., 669); *Jenkins v. Liston*, 13 Grat., 535; 2 Am. & Eng. Enc. Law (2nd Ed), 646." * * * "We think the safer rule is for the court to enter into no examination as to whether the arbitrator is in any way influenced by *ex parte* communications."

Cleland v. Hedley, 5 R. I., 163, is a case where, after the taking of evidence had been concluded, one of the arbitrators requested and received a statement from one of the parties, and the award was held void.

"The result of these cases (and many others might be added) seems to be, that an award cannot be upheld, where the arbitrator has received evidence from witnesses, of which the party had no notice, and no opportunity to be heard in reply. Still less can it be upheld, where information has been received from a party to the cause, of which the other party has no notice, and which may, from its nature, bias the mind of the arbitrator in his judgment upon the facts; and the rule would be the same if the information came from the counsel or agent of the party. And the court will only inquire in such case, whether the communication be of such a nature as might influence the judgment of the arbitrator in the cause. If they find it to be of that character, they will not stop to inquire whether, in point of fact, he gave weight to it, or his award was varied by it. Nor will they permit the arbitra-

tor to say, that evidence or information, improperly received by him, and which, from its nature, was calculated to, and more especially if it was designed to, influence his determination, did not have its natural effect upon his mind."

(d) It was not necessary for the City of Omaha to introduce evidence that the arbitrators were improperly influenced by the *ex parte* evidence.

Warren v. Tinsley, 53 Fed., 689.

Elmendorf v. Harris, 23 Wend., 628.

Ingraham v. Whitmore, 75 Ill., 24.

Alexander v. Cunningham, 111 Ill., 511.

Jackson v. Roane, 90 Ga., 669.

Moshier v. Shear, 102 Ill., 169.

Shipman v. Fletcher, 82 Va., 601.

In *Warren v. Tinsley*, 53 Fed., 689, the court said, p. 692:

"The doctrine is well established that, where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities there cited, *Ingraham v. Whitmore*, 75 Ill., 24. *Ingraham v. Whitmore* is approved, and the same rule is applied, where an umpire was called in on disagreement of the arbitrators; in *Alexander v. Cunningham*, 111 Ill., 511, 'An arbitrator greatly errs if he in any—the minutest—particular takes upon himself to listen to evidence behind the back of any of the parties to the submission.' *Drew v. Leburn*, 2 Macq. H. L. Cas., 1."

Ingraham v. Whitmore, 75 Ill., 24, is a case where the court said, p. 30:

"It is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities cited."

In *Alexander v. Cunningham*, 111 Ill., 511, the court said, p. 516:

"The doctrine is well established that where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator. *Elmendorf v. Harris*, 23 Wend., 628; *Lutz v. Linthicum*, 8 Peters, 178, and authorities cited."

Moshier v. Shear, 102 Ill., 169, is a case where an award was void because one of the arbitrators had a private conversation with a third party. The court said, p. 576:

"To sustain this award would be to sanction and justify the means by which the whole system of arbitration would be perverted and corrupted. If we hold that the party thus objecting must prove that undue influence actually resulted, then the objection would seldom be available however corrupt the influence."

In *Shipman v. Fletcher*, 82 Va., 601, the court said:

"It will make no difference in this respect whether or not the arbitrator shall swear that the testimony improperly received by him in the absence of a party, or of both parties, had no influence upon his decision. He will not be allowed to determine upon this matter. *Walker v. Frobisher*, 6 Ves. Jr., 70; *Featherstone v. Cooper*, 9 Id., 67; *Dobson v. Groves*, 6 Q. B., 637; *Plew v. Middleton*, 6 Q. B., 845; *Harvey v. Shelton*, 7 Beavan, 459."

(e) The award will be held to be void, even though it appears that the appraisers were respectable gentlemen, or did not consider the *ex parte* evidence, or were not influenced thereby.

Walker v. Frobisher, 6 Ves., 69.

Natl. Bank of Republic v. Darragh, 30 Hun., 29.

Hewitt v. Village of Reed City, 124 Mich., 6.

Dobson v. Groves, 6 Q. B., 637.

Passmore v. Pettit, 4 Dall., 270.

Knowlton v. Mickles, 29 Barb., 465.

McFarland v. Mathis, 10 Ark., 560.

Lattin v. Gamble, 154 Mich., 177-181.

In *Walker v. Frobisher*, 6 Ves., 69, the court held an award void because an arbitrator had received *ex parte* evidence. The court in speaking of the arbitrator, said, "He is a most respectable man. But I cannot, from respect for any man, do that which I cannot reconcile to general principles."

Dobson v. Groves, 6 Q. B., 637, is a case where an arbitrator had taken evidence in regular course, as in the case at bar, and received an *ex parte* statement. "No imputation was cast upon the motives of the arbitrator." Lord Denman, C. J., in the opinion said:

"The arbitrator said that nothing which passed on that meeting would influence his decision; but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it."

In *Passmore v. Pettit*, 4 Dall., 270, the court said, p. 271:

"On the subject of the reference, all the testimony should be heard, all the documents should be seen, by both the parties, in the presence of the

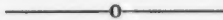
referees." * * * "The referees and umpire are, undoubtedly *honest men*; but they have erred in judgment; and their errors cannot be sanctioned, by an affirmance of the report, which their errors alone may have produced."

In *McFarland v. Mathis*, 10 Ark., 560, the court in speaking of an arbitrator who had received *ex parte* testimony, said, p. 567:

"The courts have set aside awards on that account, *although the arbitrator made oath that such examination did not influence his judgment.*"

In *Lattin v. Gamble*, 154 Mich., 177, the court said, p. 181:

"We shall assume that in sending for the solicitor for complainant and in exhibiting to him the proposed finding, in listening to his criticisms thereon, and in later considering evidence not adduced before all of the arbitrators, the two arbitrators *were entirely innocent* of any wrong intention or of impropriety. We are obliged to say that those rules of conduct to the observance of which the profession is bound were violated when one of the solicitors, in the absence of the solicitor for the other party, submitted further argument, and when, without knowing that further conference of the arbitrators was impossible, he privately expressed, or intimated, his opinion to the arbitrator chosen by his client."



(f) The Water Company will not be heard to say that its conduct in presenting its books to the board of appraisers did not improperly influence them or produce harmful results.

Catlett v. Dougherty, 114 Ill., 568.

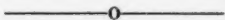
Ins. Co. v. Hegewald, 66 N. E., 902. (161 Ind., 631).

In *Catlett v. Dougherty*, 114 Ill., 568, the court in speaking of this point, said, p. 573:

“It is sufficient to authorize the enjoining of the suit at law and the setting aside of the award, that James M. Dougherty—one of the real parties in interest—made a statement to him, in the absence of his adverse party to the arbitration, evidently designed and having a tendency to improperly affect his decision as an arbitrator. *Courts will not enter upon an inquiry of how far such conduct may, in fact, have produced harmful results, but will, at the instance of the party intended to be thus injured, set aside the award.*”

In *Insurance Co. of North America v. Hegewald*, 66 N. E., 902, (161 Ind., 631), the court in speaking on this point, said, p. 908:

“A rule which seems to be reasonable, and one well settled by authorities, is that a party to an arbitration, who by his own acts either attempts to corrupt or improperly influence one or more of the arbitrators to make an award in his favor, cannot be heard to say that such act or acts on his part were ineffectual to accomplish the purpose designed.”



(g) An arbitrator who takes instructions from one side—as Mead did from the manager of the Water Company regarding the books—is in law acting corruptly.

Strong v. Strong, 9 Cush., 560.

Western Female Seminary v. Blair, 1 Disney, 370.

In *Strong v. Strong*, 9 Cush., 560, Cushing, J., said, p. 572:

“The doctrine in the case of *Walker v. Frobisher*, was afterwards affirmed by Lord Eldon himself

in *Featherstone v. Cooper*, 9 Ves., 67, in which case he says that arbitrators must understand 'that they are acting corruptly, acting as agents; and that their award ought to be set aside, where they take instructions or talk with one party in the absence of the other.' "

In *Western Female Seminary v. Blair*, 1 Disney, 370, the court said, pp. 379-380:

"When the testimony is once closed, neither party, in the absence of the other, or without the consent of the other, is permitted to be heard anew."
 * * * "So, in 9 Vesey, Jr., 68, *Featherstone v. Cooper*, it was held: 'Arbitrators must understand that they are acting corruptly whenever they take instructions, or talk with one party in the absence of the other.' "

IV.

THE SAID ENGINEERS IN ESTIMATING THE VALUATION OF THE WATERWORKS HAD NO RIGHT TO RECEIVE EX PARTE EVIDENCE. THE ARGUMENT THAT THE THREE ENGINEERS SELECTED TO VALUE THE WATERWORKS WERE MERE VALUERS OF PROPERTY, AND THEREFORE NOT BOUND BY ANY OF THE RULES RELATING TO ARBITRATIONS, AND AFTER HEARING THE EXAMINATION OF WITNESSES AND THE ARGUMENTS OF THE ATTORNEYS FOR THE RESPECTIVE PARTIES IN OPEN SESSION WERE AT LIBERTY TO SUBSEQUENTLY RECEIVE EX PARTE TESTIMONY AND TO HOLD SECRET COMMUNICATIONS WITH THE OFFICERS OF THE WATER COMPANY, IS UNSOUND IN LAW AND VIOLATIVE OF A SENSE OF FAIRNESS, EQUITY AND GOOD CONSCIENCE.

We must deal with this case not on *theory* but on the facts. These engineers, when they assembled in Omaha, *requested* information from the parties in interest as to the manner of procedure to be adopted. After the expression of views the engineers, sitting as a board, decided that they would take evidence in open *session*. As we have said *supra*, five volumes of evidence was taken exceeding two thousand pages, together with hundreds of maps, plans, and blue prints. The case was argued and submitted. *The engineers and all parties in interest were committed to this procedure.* What right had the engineers after a year and two months had gone by to hold a meeting in Cincinnati without notice to the city and there receive *ex parte* evidence? What right had the Water Company to ship its books to Cincinnati and present them to the board without notice to the city? What right had the board and manager of the Water Company, after holding a consultation over the letter of

protest sent by the city, to reach an understanding that the appraisers would receive the books of the Water Company as confidential information and to deny the city an opportunity to be present or to be heard, or to introduce counter evidence? Our insistence is that there is no reported case in judicial history that sanctions and approves this clandestine and secret procedure. The court of appeals disposed of the point without argument, but quote excerpts from two cases: *Railroad Company v. Moore*, 64 Pa., St. 79, and *Palmer v. Clark*, 106 Mass., 373. (rec. pp. 737-738.) Neither of said cases are in point on the facts. The *Pennsylvania* case is one where the railroad company was to take over the horses of an omnibus line at a price to be assessed by three persons, who met and consulted as to the value and made an award. The *Massachusetts* case is one under an agreement that "B" should fill a lot of land in a city "to be measured on the ground by the City Engineer whose measurements shall be conclusive upon the parties." In neither case was there any occasion to take testimony. In the *Pennsylvania* case the persons selected could value horses by the mere inspection. In the *Massachusetts* case the taking of evidence would have been impracticable and impossible. Neither case turned upon the point whether it was proper to receive *ex parte* evidence. The question which was decided in each case was whether the valuation affixed *constituted an award*. What was said by the court in both cases as quoted by the Circuit Court of Appeals, were but comments by the court *arguendo* noting that a distinction existed to some degree between appraisers and arbitrators. Neither case is an authority to meet the conditions existing in the case at bar.

(a) The general rule is that valuers of property, although called appraisers, or referees, or commissioners, in receiving evidence and in making awards, are governed by the law relating to arbitration.

Continental Ins. Co. v. Garrett, 125 Fed., 589.

Christianson, Norwich Ins. Co., 84 Minn., 526. (87 Am. St. Reps., 379).

Mason v. Fire Ins. Ass'n of Philadelphia, 122 N. W., 423. (S. Dak., 1909).

Hills v. Home Ins. Co., 129 Mass., 345.

Washburn v. White, 197 Mass., 540.

Insurance Co. v. Hegewald, 66 N. E. 302. (161 Ind., 631).

Manf. Builders Ins. Co. v. Mullen, 48 Neb., 620.

Sherman v. Cobb, 10 Atl., 591. (15 R. I., 570).

Lowe v. Brown, 22 Ohio St., 463.

Godfrey v. Knodle, 44 Ill., App., 638.

Stose v. Heissler, 120 Ill., 433.

Emery v. Owings, 7 Gill., 448.

Redner v. New York Fire Ins. Co., 99 N. W., 886. (92 Min., 306).

Earle v. Johnson, 84 N. W., 332.

Hart v. Kennedy, 47 N. J. Eq., 51.

All the water mains were under ground, their length, dimensions, cost of digging the trenches were matters which could not be determined by observation. The depth, cost and extent of the rip rap work on the river embankment, the cost of the excavation and walling up of the water basins and many other like matters could not be determined by observation. The hundreds of plans, maps and blue prints put in evidence by the Water Company were for the purpose of illustrating matters not subject to observation.

Mr. Fairfield, the manager of the Water Company,

testified that the purpose for which the books were shipped to Cincinnati was to assist the board in arriving at a valuation of the water works. (folio 122, p. 107).

Continental Ins. Co. v. Garrett, 125 Fed., 589, is a case of appraisers appointed to estimate the loss under an insurance policy of a building which had burned. From the nature of the case it was almost essential that the appraisers should seek evidence, as in the case at bar. The syllabi states the facts as follows:

“Where appraisers appointed to estimate a loss under an insurance policy on a brick building, the woodwork of which had been completely destroyed, and the walls partially broken down, failed to give notice to the parties of the time and place of the appraisal, so as to permit the production of evidence, the award was void.”

Lurton, Circuit Judge, said, p. 592-593:

“That notice shall be given to the parties of the time and place of the hearing is ordinarily required, from the commonest principles of justice. *Lutz v. Linthicum*, 8 Pet., 165, 8 L. Ed., 904; *Elmen-dorf vs. Harris*, 23 Wend., 628, 35 Am. Dec., 587; *Vessel Owners Co. v. Taylor*, 126 Ill., 250, 18 N. E., 663; *Warren v. Tinsley*, 53 Fed., 689, 3 C. C. A., 613.” * * * “In the present case the arbitrators were to ascertain and appraise the sound value of a brick dwelling which had been so completely destroyed by fire as that substantially nothing remained of the woodwork, inside or out. The walls themselves were in part fallen. Thus a mere examination of the premises could not, on the evidence in this record, have informed them as to the character of the finishing of the interior work, and its condition before the fire. The appraisers were experienced contracting builders, but, without some evidence, how was it possible for them to know the sound value or the loss and damage. Under such circumstances, appraisers should give notice to

both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know." * * * "*If the appraisers heard evidence as to the character and finish of the interior of this house without notice, they were guilty of misconduct.* On the other hand, if they undertook to appraise the loss and damage resulting to the assured without other information as to the character of the interior work than that to be derived from such a ruin as this was, they were equally neglectful of their duty, and exhibited an indifference to justice most culpable."

Christianson v. Norwich Union Etc. Ins. Soc., 84 Minn., 526, (87 Am. St. Reps., 379), is a case of appraisers under an insurance policy. It appears from the report of the case that the appraisers "*held various meetings for the purpose of hearing the testimony of witnesses offered by respective parties,*" but that two of the appraisers "*privately consulted witnesses concerning the quality and value of plaintiff's stock of goods, thereby materially influencing their action and decision.*" This was held misconduct and for which the appraisal was set aside as being void. The court said in the course of its opinion, p. 530:

"The board of referees provided for under the standard policy is a *quasi* court, subject to the principles governing common law arbitration. Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination." * * * "But while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, *such board is not selected for the purpose of seeking evidence secretly, and determining the amount of the loss by reason of such personal knowledge.*"

Mason v. Fire Ins. Ass'n of Philadelphia, 122 N. W.,

423, is a case where it was ruled that appraisers under an insurance policy are a *quasi* court and should proceed in a judicial manner to hear evidence, etc. The court in its opinion said, p. 426:

"It is true that in the articles of submission to the appraisers in this case it was not stipulated that notice should be given, or a hearing had, but clearly justice requires that appraisers so appointed shall fix the time for their meeting, of which the parties, respectively, should be notified, and that they should hear and consider such evidence as should be introduced by the respective parties on such a hearing." * * *

"The board of appraisers, including the umpire, constitutes a *quasi* court, governed by rules applicable to common law arbitrators, and should constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, without regard to the manner in which the duty has been devolved upon them."

Hills v. Home Ins. Co., 129 Mass., 345, is a case where an award under an insurance policy was held to be void because the appraisers of the loss (called arbitrators in said case) received *ex parte* testimony. The court in that case said, p. 348:

"Corruption, partiality or misconduct on the part of the arbitrators is a sufficient objection to an award, independently of any question as to a formal revocation of their authority. The facts reported show that two of the arbitrators at the second hearing were not impartial men, but had heard the case upon *ex parte* testimony, and had committed themselves to a decision which was not satisfactory to the plaintiff upon the very question in dispute. And this new hearing was had, not only after those two arbitrators had so committed themselves, and prejudged the case, but without notice to the plaintiff. It is true that much will be presumed in favor of an impartial

and fair award, but the irregularity in this case takes it out of the general rule. *Conrad v. Massasoit Ins. Co.*, 4 Allen, 20. *Strong v. Strong*, 9 Cush., 560."

Emery v. Owings, 7 Gill., 448, is a case of the appraisalment of the cost of the construction of a private road. The appraisers were guilty of an *ex parte* examination of books of account. The court held the award void and said:

"To hear the cause of a party in his absence, and without notice, would be bad enough in all conscience, but in his absence, in such a case, to decide his cause upon the declarations of his antagonists, made when he was absent, surely is without precedent. Such circumstances we cannot sanction."

Redner v. New York Fire Ins. Co., 92 Minn., 306, is a case of appraisers appointed under a fire insurance policy. The facts sufficiently appear from what the court said as follows:

"The facts alleged as a ground for setting the award aside are not simply that the arbitrators refused to receive material and pertinent evidence, but that they refused the plaintiff the privilege of appearing before them, and refused to hear any evidence whatever from the plaintiff, or the witnesses produced by him, or any testimony on his behalf. If such allegations of the complaint be true, the arbitrators acted arbitrarily, for the plaintiff was legally entitled to appear before them and be heard, and to introduce evidence as to the amount of his loss. A denial of such right made the award voidable. *Mosness v. Ins. Co.*, 50 Minn., 341, 52 N. W., 932; *Janney, Semple & Co. v. Goehringer*, 52 Minn., 428, 54 N. W., 481; *Levine v. Ins. Co.*, 66 Minn., 138, 68 N. W., 855; *Christianson v. Ins. Co.*, 84 Minn., 526, 88 N. W., 16, 87 Am. St. Rep., 379; *Produce Refrigerator Co. v. Ins. Co.*, (Minn.), 97 N. W., 875."

Earle v. Johnson, 84 N. W. 332 (81 Minn. 472) is a case of appraisers appointed under a lease. The court said, p. 333:

"A person acting in the capacity of the plaintiff as an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is, in effect, a common law arbitration."

Hart v. Kennedy, 47 N. J. Eq. 51, is a case of an appraisement by three engineers where they refused to hear evidence tendered by one of the parties which the court held to be misconduct as appears from the following excerpts from the opinion:

"While these two suits were pending, the parties, in December, 1888, agreed to submit the matters in difference between them to the decision of three competent and impartial civil engineers, who understood the force, pressure, and effect of water,—one to be selected by the complainants, another by the defendant, and the third by the other two. The three so selected were to survey the ground, take levels, and determine—*First*, whether back-water on the lands of the complainants was caused by the dam of the defendant, and whether his dam caused water to overflow and damage the lands of the complainants; and, *second*, if so, how much the dam of the defendant should be reduced to prevent such back-water." * * * "The defendant by both his pleadings, alleges that the two arbitrators who made the award *refused* to hear any evidence on his part, pertinent and material to the matters in dispute. He says that when they first met to enter upon the discharge of their duties, as well as subsequently, he asked permission to lay such evidence before them, but that his request, each time it was made, was refused." * * * "Arbitrations are to be conducted upon the ordinary principles upon which other

judicial inquiries are conducted. The parties have a right to be heard by their proofs. Their right, in this respect, is a primary right. It is founded in natural justice. 'The principle,' said Chief Justice Spencer, in *Van Cortlandt v. Underhill*, 17 Johns, 405-411, 'is so fundamentally just that it requires no adjudged cases to support it.'"

The same rules apply to appraisers and arbitrators alike. In both classes of cases the receiving of *ex parte* evidence is forbidden, (see cases *supra*), and in both classes of cases all must join in the award unless it is otherwise provided.

Washburn v. White, 197 Mass., 540, is a case where the tenant under a clause in a lease had the privilege of electing to purchase at a price to be agreed upon by the award of three disinterested persons, one to be chosen by the lessor, one by the lessee and the third by the two so chosen. In that case, among other things it was ruled that an award of the appraisers to be valid *must be concurred in by all*.

Insurance Co. v. Hegewald, 66 N. E., 902, 161 Ind., 631, is a case of appraisers appointed under the provisions of an insurance policy. The court held that the appraisers were governed by the same rules as governed arbitrators, and among other things said:

"Appraisers in cases like the one at bar are considered as acting in a *quasi* judicial capacity, and in discharging their sworn duties they must act free from bias, partiality, or prejudice in favor of either of the parties. *Flatter v. McDermitt*, 25 Ind., 326; *Hickerson v. German, Etc. Ins. Co.*, 96 Tenn., 193, 33 S. W., 1041, 32 L. R. A. 172."

Manf. Builders Ins. Co. v. Mullen, 48 Neb., 620, is a case of appraisers appointed under an insurance policy. The court applied the doctrine of arbitration and held

the award void because signed by the umpire and by one arbitrator only.

Sherman v. Cobb, 15 R. I., 570, is a case of a renewal of a lease where the rental was to be appraised by three persons. The court applied the rule of arbitration and award and said:

“Under the covenant, however, there is no agreement that the award shall be binding unless it is unanimous, and therefore a mere majority award would not be binding under the covenant.”

Lowe v. Brown, 22 Ohio St., 463, is a case where a ground lease was to be “revalued” by three disinterested men; one appointed by each of the parties and these two to select the third. The court applied the rule relating to arbitration and held the appraisal void because only signed by two.

“The only power conferred upon the appraisers was expressly specified in the indenture. That instrument does not provide that the appraisement or report may be made by a majority of the appraisers. Nor can such authority be implied from its terms as may be done in cases where two, selected to make an appraisement, are empowered, in case of a disagreement, to call in a third.” * * * “The report, therefore, signed by two of the appraisers only, was of no validity, and was properly so regarded by the court below.”

Godfrey v. Knodle, 44 Ill. App., 638, is a case of the valuation of property under a lease. The court applied the rules relating to arbitration and held the valuation void because not concurred in by the three valuers.

Stose v. Heissler, 120 Ill., 433, is a case of appraisal under a lease. The court applied the same rule and said:

“The matter of fixing the rent was confided to the judgment, experience, and discretion of the persons nominated by the parties, and the one to be

selected by such nominees. The confidence of the parties was in the united judgment of the three, and they agreed to be bound by nothing less than their concurrent judgment."

The foregoing cases are sufficient to show that it is firmly established that appraisers or valuers of property are required to be straight forward in the conduct of their appraisalment; to hear evidence when tendered by the respective parties; are governed by the general rules that apply to arbitrations; that they act in a semi-judicial character; and that it is gross misconduct for them to receive *ex parte* evidence as was done by the appraisers in the case at bar.

The *ex parte* and secret manner of receiving and examining the books by the appraisers at Cincinnati in the presence of the manager of the Water Company, the subsequent private conference between the chairman of the appraisers and the treasurer of the Water Company in Chicago, can not be excused or justified on the ground that this was a *public appraisalment*. *If this were a public appraisalment why should it not have been conducted in a public manner? Is there any law or sense of justice that permits a public appraisalment to be conducted in a secret manner?* Can public appraisers receive secret evidence tendered by one party and refuse the adverse party an opportunity to explain or rebut such evidence? An appraisalment can not be said to be a public appraisalment except the public be interested. If the public is interested in the appraisalment they have a right to know what is going on. In the case at bar the city (the public) were precluded from knowing what was going on at Cincinnati and were excluded from the right to rebut the secret evidence tendered by the Water Company. This proceeding is inconsistent with the idea that this was a public appraisalment. Such proceeding is misconduct which invalidates any award, public or private, alike.

THE AWARD IS VOID BECAUSE THE APPRAISERS EXCEEDED THEIR AUTHORITY IN APPRAISING AND INCLUDING IN THE AWARD THE SUM OF \$562,712.45 FOR GOING VALUE.
(rec. p. 165.)

The appraisement is made under Section 14 of Ordinance 423, which reads:

“Sec. 14. The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided, that nothing shall be paid for the unexpired franchise of said company.”

Said section does not provide for the appraisal of the “going value.” The right of the city to purchase did not accrue until the expiration of twenty (20) years from the construction of the works. This gave the water company the right to the rents, profits and revenues for the full period of twenty (20) years. This was adequate to give the company compensation for the venture. There is no reason under the circumstances why the water company should be paid for the works and in addition thereto to receive by way of a bonus \$562,712.45, under the name of “going value.” The city was not buying the franchise of the company, nor the good will of the company, nor the business of the company, but it was buying the *water works* and nothing more.

This court in *Knoxville v. Water Company*, 212 U. S. 1, expressed some doubt as to the propriety of including \$60,000 for going concern. What this court said in *Wilcox v. Consolidated Gas Co.*, 212 U. S., 19-52, re-

lating to "good will," seems equally appropriate to "going value" in the case at bar.

"We are also of opinion that it is not a case for a valuation of 'good will.' The master combined the franchise value with that of good will, and estimated the total value at \$20,000,000.

"The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action."

VI.

THE AWARD INCLUDES PROPERTY THE CITY IS WITHOUT AUTHORITY TO PURCHASE, TO-WIT: THOSE PARTS WITHIN AND USED ONLY TO SUPPLY WATER TO FLORENCE, DUNDEE, EAST OMAHA AND SOUTH OMAHA.

The award includes the parts of the water works system used to supply water to the following out-laying municipalities: Florence, \$13,881.31; Dundee, \$19,398.83; East Omaha, \$21,568.50; South Omaha \$446,256.84. Going value in South Omaha, \$84,406.86. (See rec. pp. 164-165.) This action being one in equity to compel the city of Omaha to purchase the works of the company, including the parts in these out-laying municipalities, the relief should not be granted unless the right of the water company to compel the city to purchase the outlying properties is clearly established.

The charter of the city in force when the contract was made is found in Section 27, Laws of Nebraska 1879, page 99.

"27. To erect, construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and reg-

ulations concerning the use of water supplied by such water works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or governed by said act shall have power to contract with and to procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed on."

To construct water works for whom? Manifestly for the city of Omaha, not for other cities.

The first part of the section is a grant of authority to the city to erect and construct water works within or without the corporate limits. The concluding part of the section relates to the right to contract for the supply of water. The right granted to the city to construct water works within or without the corporate limits of the city contemplates the right to go outside the corporate limits to obtain a *source of supply*, but the works to be constructed or contracted for are limited to a supply of water for the city of Omaha.

The city employed *J. D. Cook* as an expert engineer to report a plan for a supply of water and which report devised a plan for a supply for the city of Omaha. (rec. pp. 319-336.) Thereupon the city passed Ordinance 423, (rec. pp. 680-686) and amendatory Ordinance No. 430, (rec. pp. 686-688) which authorized a contract for the construction of "water works in the city of Omaha * * * for the purpose of *supplying said city* and the citizens and inhabitants thereof with water for domestic, mechanical, public and fire purposes." The election to purchase and the appraisalment of the value of the water works is under Section 14 of said ordinance 423, (rec. p. 686) and quoted in the preceding chapter of this brief. The contract for the construction of the water works is

to "erect, construct and maintain said water works in the city of Omaha and to *furnish the city of Omaha*, party of the first part, with water for fire protection and public use for the term of twenty-five (25) years" pursuant to the said ordinances Nos. 423-430. (rec. pp. 688-689.) The ordinance of the city electing to purchase (rec. p. 160) provides:

"And do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company and as authorized and provided by section 14 of the Ordinance No. 423."

So far we see that all of the provisions of the said charter, the ordinances, the election to purchase and the selection of appraisers is for the "purpose of ascertaining the appraised valuation of said water works plant as provided in Section 14 of Ordinance No. 423." (See section 2 of ordinance electing to purchase. p. 160.)

It appears by affirmative evidence that when Ordinance No. 423 was enacted and the water works constructed, Dundee, East Omaha and South Omaha were not in existence. South Omaha was first incorporated in 1886 and Dundee in 1894. East Omaha is but a voting precinct up to date. (rec. pp. 436-437.) The court of appeals in its opinion put stress upon a provision in an act of 1897, which contains the following:

"To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, electric light plants or water works, including mains, pipe lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they

shall also have power to appropriate any water works system, plant or property already constructed, *to supply the city* and inhabitants thereof with water or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any."

It is a mistake to assume that because the city was given power to *appropriate* any water works system which might be wholly within or in part without the city, that said section was intended to give the city a right to own and operate water works for the purpose of supplying *outlying* cities with water. At the time when said act was passed the in-take of the water company was at the bank of the Missouri river at the northern limits of the town of Florence, a distance of some six miles or so from Omaha. The language of the section was drafted to be appropriate to the situation; that is to enable the city to appropriate the in-take and the settling basins which were without the limits of the city.

The first part of the statute we have just quoted *supra* including the "ten miles limit" applies to sewers, parks, parkways, boulevards and electric light plants, as well as to water works. Certainly no one would contend that the city of Omaha was given authority to construct, own, maintain and operate sewers and parks and boulevards, etc., within and *for the benefit* of the outlying municipalities, Florence, Dundee, East Omaha and South Omaha. The language goes no further than to give the city the power to acquire the in-take of the water com-

pany which may be without the city limits, as well as an out-let for its sewers which may be without the city limits, and likewise to go beyond the city limits to buy property for parks, boulevards, etc. But all the while the statute was only dealing with things and instrumentalities which were to be used as stated in the section "*for the use of the city.*" The court of appeals construed the section as giving the city power to acquire any of the properties or things mentioned for the use of *some other municipality.*

The act of 1905 creating the Water Board contains two sections pertinent to the question at hand. (Laws of Neb., 1905, pp. 172-5.):

"Section 7659. The Water Board shall have general charge, supervision, and control of all matters pertaining to the *water supply of such city for domestic, mechanical, public and fire purposes as hereinafter provided:* If such city, or any portion thereof, shall be supplied with water for domestic, mechanical, public or fire purposes by any individual, co-partnership, or corporation, then, and in such case, said board shall have the sole power and authority to *regulate and fix the water rates and fire hydrants rentals;* to provide for and order the extension of water mains; to determine the number and designate the location of all fire hydrants; to audit, pass upon, and pay or reject any and all bills for water or fire hydrants furnished such city; to make, modify, and terminate, on behalf of such city, all contracts for the supply of water to such city for domestic, public or fire purposes."

"Section 7661. The Water Board may contract *with any municipality* adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or *may contract, to the same end, with any person, co-partnership, or corporation, supplying any such adjacent municipality* with water for domestic,

public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that *all water* so furnished shall be measured by *meter at the expense of such municipality, person, co-partnership, or corporation*, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such *metropolitan city* and its inhabitants by such municipal water plant; provided, further, that in computing the income of such water plant, each fire hydrant located within such metropolitan city shall be assumed to produce a reasonable revenue to be definitely fixed by said board."

The power to regulate water *rates* and hydrant *rentals* in the first section quoted is *limited to the city of Omaha*. The act only creates a water board in each city of the metropolitan class. (see sec. 7654 of said act.) Omaha being the only city of the metropolitan class, is the only city in the state that has a water board. The grant of power in Section 7661 is not to purchase, own and operate water works in Florence, Dundee, East Omaha and South Omaha, but only to *sell water* directly to said municipalities, or to any water company that shall supply said municipalities with water. The price to be charged for such supply of water, if taken by the municipality, is to be paid for by such city in gross by meter measurement. That is to say if the Omaha Water Company retains its ownership of its distribution system in Florence, Dundee, East Omaha and South Omaha, the water board of the city of Omaha may sell to the water company, water to be by it delivered to said municipalities. If said municipalities shall own their own water system within their own limits, the water board may sell water to the said municipalities. But the municipalities

in that event regulate their own distribution of water, their own rates, their own hydrant rentals.

What we point to is that there is no existing statute of the State of Nebraska authorizing the city of Omaha to purchase, own and operate a water works system within the out-lying municipalities for the purpose of supplying them with water. The purpose of the sections quoted *supra* was to preserve a method by which the water board might make contracts to supply outlying municipalities with water. What is sought in the case at bar is to *compel* the city of Omaha to purchase the water works in the several municipalities and consequently to compel the city of Omaha to operate said works in said municipalities. We might as well say with equal force that the city of Omaha is authorized to construct and operate the sewer system, or the park system, or the electric light system in these outlying towns. The statute gives no such grant of power to the city of Omaha and without it a court of equity can not confer it.

If the water works are taken over it must be by an issue of bonds by the city of Omaha and by a levy of taxes to pay the interest and principal thereof. Nowhere in the statute is there any authority given the city of Omaha *to issue bonds* or to *levy taxes* upon the property within its limits to *pay for the purchase and operation of water works in some other city and for the benefit of some other city*.

It is elementary law that a municipality acts under delegated power and can exercise only such rights and powers as are expressly conferred or necessarily implied from express grants; and all grants of power are to be strictly construed. *Citizens St. Ry. Co. v. Detroit Ry Co.*, 171 U. S., 48-53. *City of Fort Scott v. Eads*

Brokerage Co., 117 Fed., 51-54. *State v. Ireys*, 42 Neb., 189.

There are many cases in which it has been ruled that cities have no power to levy taxes for the purpose of maintaining or to own or construct water works for the benefit of adjoining municipalities. *Sutherland-Innes Co. v. Village of Evert*, 86 Fed., 597. *Ottawa v. Carey*, 108 U. S., 121. *Quincy v. City of Boston*, 148 Mass., 389. *Arnold v. Mayor of Pawtucket*, 21 R. I., 15. *City of Duluth v. Duluth Gas & Water Co.*, 45 Minn., 210. *Farwell v. City of Seattle*, 86 Pac., 217 (43 Wash. 141). *Town of Bristol v. Bristol & Warren Water Works*, 49 Atl., 974; 23 R. I., 274.

Where the power of one city to supply another city with water has been sustained there will be found express statutory authority to that end. *Town of West Hartford v. Board of Water Commissioners*, 68 Conn., 323. *City of Pittsburg v. Brace, et al.*, 158 Penn., 174.

The Omaha Water Company has at all times dealt with these outlying municipalities under an independent right and accepted from them charter or contract privileges. The predecessor of Omaha Water Company accepted a franchise from South Omaha, approved October 17, 1887, (rec. pp. 419-420) which ran for a period of 17 years, or to October 17, 1904. The election of the city of Omaha to purchase was dated February 24, 1903. In August, 1903, the water company accepted a new franchise from the City of South Omaha, running for a period of 10 years, (rec. p. 421) and which contains an obligation that the water company shall pay to South Omaha \$2,500 per annum "after the year 1903 and during the existence of this contract." A subsequent ordinance of South Omaha amended this franchise (rec. p. 422) to the effect that if the company should erect addi-

tional hydrants during 1903 and 20 additional hydrants during 1904, that the annuity should be reduced to an amount equal to \$60.00 for each of the hydrants in South Omaha. *Evidently the water company believed it had an independent right to contract with South Omaha and entered into said contracts notwithstanding the election of the City of Omaha to purchase the water works.*

The charter of the City of South Omaha, (Compiled Statutes of Nebraska 1909, p. 401, Chap. 13, Art. 2, 1470) gives the city authority as follows:

“To erect, construct, purchase, maintain, and operate subways or conduits, *water works*, gas works, and electric light plants, or necessary parts thereof within the corporate limits of the city; and they shall have *power to fix, charge and collect a rental* or compensation for the use of subways or conduits, and of water, gas, electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights, and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act, and the mayor and council of such city shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas, or electric light or electric power to the public or private consumers within such city, and the rates, terms, and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract as provided in this act.”

It needs no comment to show that the provision of the charter of South Omaha is *inconsistent and directly in conflict* with the thought that Omaha may own and

control the water works in South Omaha, regulate rates, etc.

The city of Florence entered into independent contracts with the water company for supply of water. (rec. pp. 423, 426, 713, 714, 717, 718, 719, 720.) These contracts require the water company to extend mains and set fire hydrants whenever ordered to do so by the city council of the city of Florence; fixes the price of hydrant rentals, water for public schools, etc. (rec. pp. 426-427).

The contract with East Omaha, (rec. p. 428), provides in sub-division tenth, (rec. p. 431):

“In case of any purchase of the works of the second party in the city of Omaha by the said city, and the said property of the said first party shall not be included within the corporate limits of said city of Omaha, then and in such case the first party shall have the option to purchase the mains and pipes laid down within the said property; and if it does not choose to purchase the same the second party may convey the same to the city of Omaha subject, however, to the provisions of this instrument.”

Said quotation from the contract with East Omaha is inconsistent with the thought that the election to purchase by the city of Omaha would include the works in East Omaha. Manifestly the Water Company did not construe a purchase and appraisalment under Section 14 of Ordinance 423 would include the outlying properties.

A similar situation existed in *National Water Works Co., v. Kansas City*, 65 Fed., 691. The water works plant was used to supply water to Kansas City, Missouri, and to Kansas City, Kansas. The source of supply was in Kansas, yet the court held that while Kansas City, Mo., had a right to purchase the intake of the source of supply, yet it was not required to purchase the distribution system in Kansas City, Kansas. For reference to a discussion of the situation in that case, see pages 698-9 of the case, *supra*.

VII.

EQUITABLE CONSIDERATIONS WHY A DECREE OF SPECIFIC PERFORMANCE SHOULD NOT BE ENTERED AS PRAYED.

Aside from the questions heretofore argued which we believe render the award void, there are equitable considerations why a decree for specific performance as prayed, should not be ordered.

First. The relief prayed for is that the city shall be required to take over the water works system and pay therefor in money the sum of \$6,263,295.49. The award sets forth in the last paragraph thereof that a certain inventory included in the said award "should be revised and corrected in accordance with the material on hand at the time of transfer and the valuation herein contained should be modified in accordance with the materials on hand at that time." (rec. p. 165.) Said inventory is not in the record, it has not been revised and corrected, the court can not know definitely what the amount of the appraisement should be, or the correct amount of money which the city should be required to pay. This suit was instituted on the identical day of the filing of the award, which did not permit of any such correction and revision. The amount of the award is therefore left indefinite and uncertain.

Second. The deed tendered (rec. p. 723) is made *subject to the contract obligations* of the Omaha Water Company to the municipalities of *South Omaha, Florence, Dundee, Benson and East Omaha*, (folio 841) and is without covenants of warranty. It appears in the record that the water works are subject to two mortgages: one for \$1,500,000, dated July 23, 1896, maturing 1916, and another under the same date for \$6,000,000, maturing 1946. (rec. pp. 197-215.) Said mortgages cover the

property in the outlying municipalities and, in aggregate amount, exceed the award. The trustees under the respective mortgages are not parties to the suit, therefore the rights of the bondholders can not be adjusted in this proceeding, because their rights in the water works property in Florence, Dundee, East Omaha and South Omaha cannot be cut off nor determined. The rights of the bondholders under the said mortgages in the outlying properties *was not subject to the election of the city of Omaha to purchase.*

The demand made upon the city when the deed was tendered was for the payment *instantly* to the water company of the sum of \$6,263,295.49. (rec. pp. 34-35.) If the city had complied with the demand and accepted the deed tendered, or if the court should enter a decree as prayed, the city would pay to the water company \$6,263,295.49 and would obtain nothing therefor, but an *equity* in the property of *no value*, because the mortgage obligation exceeds the purchase price. It is a rule of equity that a decree of specific performance will not be entered where the purchaser would only obtain an equitable title. *Wesley v. Eells*, 177 U. S., 37. *City of Tiffin v. Shawhan*, 43 Ohio St., 178. *Guild v. Atchison, Topeka & Santa Fe Ry.*, 57 Kan., 70.

Third. A court of equity will not decree a specific performance except where the right is clear. Owing to the fact that the award was only signed by two of the appraisers, and owing to the misconduct of the appraisers in receiving *ex parte* evidence, and owing to the fact that the award includes outside properties, etc., it is apparent that the minds of the parties were not agreed, either as to the manner of the appraisal, or as to what was to be included in the appraisal under the contract. The complainant has not proven such a clear right as

entitles it to specific performance under the circumstances stated. *Willard v. Tayloe*, 8 Wall., 557-565; *Hennessey v. Woolworth*, 128 U. S., 438-442; *McCabe v. Matthews*, 155 U. S., 550-553; *Hildreth v. Duff*, 148 Fed., 676.

Although the proof might come far short of showing sufficient to authorize the court to set aside the award, nevertheless, it may be sufficient for a court of equity to refuse specific performance. *Shoop v. Burnside*, 78 Kan., 871-876. *Banaghan v. Malaney*, 200 Mass., 46-49.

Fourth. The election of the city of Omaha to purchase was made February 24, 1903. The case was submitted to the appraisers December 31, 1904, the award was not handed down until July 7, 1906. These delays of themselves would be sufficient to deny the decree of specific performance. *C. M. & St. P. Ry. Co. v. Stewart*, 19 Fed., 5. (a delay of six months.) *Gotthelf v. Stranahan*, 138 N. Y., 345. (a delay of three months.) *Gish's Executors v. Jamison*, 31 S. E., 521, (96 Va., 312.) Great changes may have taken place in the value of the property in the interim between the election to purchase and the coming down of the award (More than three years.) Besides the award fixes the value of the property as of the date of the award, while the law requires the valuation to be fixed as of the date of the election to purchase. *Bristol v. Bristol*, 25 R. I., 189. *Cherryvale Water Co. v. Cherryvale*, 65 Kans., 219. *Caldwell v. Frazier*, 65 Kans., 24. *Rockport Water Co. v. Rockport* 37 N. E., 168, 161 Mass., 279. *C. M. & St. P. Ry Co. v. Stewart*, 19 Fed., 5.

Fifth. It is provided in the act of 1905 (Laws of Nebraska, 1905, p. 173):

"Said water board shall have the sole power and authority * * * including * * * the acceptance or rejection of any award resulting from any such appraisement * * * provid-

ed, that no acceptance of any such appraisement shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisement."

The water board by a series of preambles and resolution did reject said award as being illegal, null and void. (rec. pp. 166-169).

Sixth. We are constrained to insist that by reason of the considerations in this brief presented, the Omaha Water Company is not entitled to a decree of specific performance and that the order and judgment in the Circuit Court of Appeals should be reversed and the order and judgment of the Circuit Court dismissing the bill should be affirmed. It would be agreeable to the city of Omaha if this court be so advised to enter its order and judgment setting aside the award and remanding the case to the Circuit Court under proper directions to proceed in a judicial manner to ascertain the value of the water works as was done in the case of *Castle Creek Water Co. v. City of Aspen*, 146 Fed., 8.

JOHN LEE WEBSTER.

CARL C. WRIGHT.

HARRY E. BURNAM.

Solicitors for City of Omaha.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 159.

Office Supreme Court U. S.

FILED

APR 7 1910

JAMES H. MCKENNEY,

Clerk

THE CITY OF OMAHA,

Petitioner,

vs.

THE OMAHA WATER COMPANY,

Respondent.

BRIEF OF RESPONDENT.

HOWARD MANSFIELD,

R. S. HALL,

HERBERT C. LAKIN,

Of Counsel for Respondent.

HOWARD MANSFIELD,

Solicitor for Respondent.



Supreme Court of the United States.

OCTOBER TERM, 1909.

THE CITY OF OMAHA,
Petitioner,

vs.

THE OMAHA WATER COMPANY,
Respondent.

No. 159.

BRIEF OF RESPONDENT.

Statement.

This case comes before this Court by writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, granted June 1, 1908, on the petition of the City of Omaha, for the review of the decision of that Court, filed April 7, 1908, reversing a decree of the Circuit Court of the United States for the District of Nebraska, entered on June 29, 1907, which dismissed the bill of complaint of The Omaha Water Company in a suit against the City of Omaha to compel specific performance of the city's agreement to buy the system of water works operated by the water company (Record, pp. 187, 746, 747).

By the decision of the Circuit Court of Appeals the agreement of purchase was held to be binding upon the city, the appraisement instituted by the city for the purpose of ascertaining the purchase price was held to be valid, and the cause was remanded with directions to proceed to decree in accordance with the views expressed in the opinion.

The decision is reported in 162 Fed., 225, and the opinion appears in the Record at p. 733.

The specific assignments of error stated in the Petition for Writ of Certiorari are as follows:

"1. That the Court erred in holding that the terms of the contract reserving to the City of Omaha the election to purchase the water works authorized a valuation of the water works by a majority of the three appraisers, whereas the Court should have held that by the terms of the contract the valuation of the water works could only be ascertained by the concurrence of the three appraisers.

2. The Court erred in holding that the valuation of the water works, under the election clause in the contract, was in the nature of a public appraisement in which the appraisers were acting for the public as distinct from an appraisement under a contract between individuals or private corporations, whereas the Court should have held that the said contract between the City of Omaha and the Water Company as between the contracting parties, was governed by the same rules, principles and obligations that govern contracts between individuals or private corporations, as the same Court had previously held in the suit of the *Omaha Water Company v. The City of Omaha*, 147 Fed., 1.

3. That the Court erred in holding that the secret and *ex parte* receiving in evidence and

examination of the books of the Omaha Water Company at Cincinnati, February 7, 1906, was not an improper procedure and was justified by precedent, whereas the said Court should have held that the same was misconduct on the part of the Omaha Water Company and on the part of the board of appraisers, and that said misconduct rendered the award void.

4. The Court erred in holding that the election to purchase by the City of Omaha included all the properties of the Omaha Water Works system, including the parts lying in the said outlying municipalities, and used only for the supplying of the said outlying municipalities with water, whereas the Court should have held that the said election to purchase, by its terms, was limited and confined to that part of the water works constructed under the contract with the City of Omaha, and used only for the purpose of supplying the City of Omaha with water for fire protection, public and domestic uses, and was so limited by Section 14 of the contract between the City of Omaha and the Water Company, said Section being the only authority under which the election to purchase existed.

5. That said Court erred in holding that the City of Omaha had corporate authority to purchase that part of the water works system extended into and used only for supplying the municipalities of East Omaha, South Omaha and Dundee with water, whereas the Court should have held that the City of Omaha was possessed of municipal authority to purchase only that part of the water works used for the supplying of the City of Omaha with water for fire protection, and public and domestic use, and such as was necessarily appurtenant thereto (Petition, pp. 8 and 9).

While the answer in this case freely characterizes as "illegal and wrongful" and "grossly wrongful and irregular" on the part of the two appraisers, Mead and Benzenberg, procedure in which the appraiser Alvord joined equally with the others, and repeatedly refers to the estimate of value as "fraudulent and void" (Record, pp. 26, 27, 28, 29, 30), and the brief of counsel for the city echoes these charges with talk of "a moral principle" involved (Brief, p. 28), there is not a particle of proof in the case to sustain such charges, nor was any supporting proof even offered. From the organization of the board to the signing of the report, Mr. Alvord was present and took part in everything that was done by the appraisers, and was in a position to put counsel for the city in complete possession of every fact and circumstance of the appraisal; yet he was not introduced as a witness for the city. Nor was there any pretense of showing by any evidence whatever that the estimate of value reported by the board is in any degree excessive or unfair to the city.

The continued averments in the answer that the two appraisers Mead and Benzenberg, "misconceiving their duties in the premises", and "in violation of their duties", and "in fraud of the rights of the defendant", adopted improper methods of procedure in determining the value of the water works, are not only absolutely without foundation in fact, but imply that throughout the proceedings of the board the appraiser selected by the city was overruled by the other appraisers, a wanton insult to all three appraisers, which is equally baseless in fact and without a shred of justification.

Every reflection upon the character and conduct of the appraisers is swept away by the Circuit Court of Appeals, which unhesitatingly declares that "there is no ground for questioning their entire honesty and sincerity" (162 Fed., 232).

Facts.

Origin of the Contract.

The contract of purchase was an incidental part of a contract on the part of the city with a predecessor of the water company for the construction and maintenance of a system of water works.

In 1879 the Nebraska legislature had passed an act giving the mayor and council of any city of the first class, of which class Omaha was then the only city in the State, power "to erect, construct and maintain water works, either within or without the corporate limits of the city . . . and to do all acts necessary for the construction, completion, management and control of the same . . . and to contract with and procure individuals or incorporations to construct and maintain water works on such terms and under such regulations as may be agreed upon." (Record, p. 371.)

In 1880 the City of Omaha, a community of some 30,000 inhabitants, employed an engineer named Cook to draw up a plan by which the city should have a system of water works which should serve both public and private purposes (Record, p. 319).

Upon the coming in of Cook's report, the city passed an ordinance (Ordinance 423) for the purpose of procuring the erection and maintenance by private interests of the system recommended.

This ordinance, which was enacted June 11, 1880, (Record, pp. 680-686), provided that any person, company, corporation or association who should erect, construct and maintain water works under Cook's plan "within and adjacent to the City of Omaha", for the purpose of supplying the city and its inhabitants with water for public and private purposes, should have the right to lay its pipes in the streets and maintain its system in the community, "during the time such person, company, corporation or association, or their assigns, shall maintain and operate any such water works." (Record, p. 680.)

Two sections of this ordinance are specially relevant to the determination of the questions now under review. The first of these is Section 11, (Record, p. 684):

"In case of the refusal or neglect of any person, company or corporation, or their assigns, who shall construct water works under this ordinance, to comply with the provisions and requirements herein contained, and each thereof, and to keep such water works in good order and repair, and ready and fit for immediate and constant use, in accordance with the requirements of this ordinance (a reasonable time being allowed for repairs in case of accident), all rights, privileges and immunities granted by and acquired under this ordinance shall be forfeited, and the said City of Omaha shall thereby be and become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith, subject to the payment of a just compensation therefor, to be ascertained as provided in section 14 of this ordinance; Provided, that nothing shall be paid or allowed for the unexpired franchise of such person, company or corporation."

The other is Section 14, (Record, p. 686):

“The city of Omaha shall have the right at any time after the expiration of twenty years to purchase the said water works at an appraised valuation, which shall be ascertained by the estimate of three engineers, one to be selected by the city council, one by the water works company, and these two to select the third; Provided, that nothing shall be paid for the unexpired franchise of said company.”

As a result of the advertising for bids, provided for in section 12 of the ordinance, the city entered into a contract with one Locke, who assigned his contract to the City Water Works Company of Omaha, which completed the system. The system was accepted by the city on September 4, 1883, by Ordinance No. 618 (Record, p. 339).

Growth of the System.

As Cook's report indicated, the system, including the pumping station, was originally located within the city limits. The ordinance compelled the use of the Missouri River water and a system of settling reservoirs, in order to clarify the water (Record, Sec. 2, p. 680). As directed in the report, the pumping station and settling basins were located at the foot of Burt and Izzard Streets, being in the general neighborhood of the Omaha Smelting Works. The original contract provided for only 250 hydrants (Record, p. 682). In 1904 there were 1,884 hydrants (Record, p. 442). In 1885, about two years after the plant was completed, the daily consumption of water was three and a half million gallons (Record, p. 118). In

1904, it was sixteen million gallons or more (Record, p. 117). Without counting certain service mains, the total mileage of pipe of the system of the company was, in 1904, about 220 miles, of which 182 miles were in the City of Omaha, and 31 miles in the City of South Omaha, (Record, p. 437 and ff).

As early as 1887, it became manifest to the American Water Works Company of Illinois, which had meanwhile acquired the water works, that the Burt Street pumping and settling station was inadequate. The company, after careful inquiry, discovered in the City of Florence, some six or seven miles north of the Burt Street Station, and on the Missouri River, the one place within many miles where rock bottom could be reached within a measurable distance of the surface of the river. On this new location, the company proceeded to erect an extensive pumping station, including settling basins as well as intakes. Not the least important feature of this work was the construction of what is technically known as rip rap, in order to protect the company's property from invasion by the river and at the same time to prevent the river from running off into Iowa, (Record, pp. 542-4, 565-570, 576-594, 594-625, 625-636, 641-657).

Growth of the Community.

Omaha is situated on a series of bluffs, bounded on the east by the Missouri River. Within less than three miles back from the river the bluffs develop into high hills. The result has been that Omaha has grown north and south along the river much more extensively than westward from the river. The community has entirely outgrown the

mere geographical limits of the city, so that there is now a continuous community more than eight miles long and, for the most part, much less than three miles wide, beginning at the company's pumping stations in Florence on the north and extending down through Omaha and South Omaha on the south (Record, pp. 572-3). The City of Omaha in 1904 had a population of 125,000 (Record, p. 454). Florence was still a small community, but south of the City of Omaha, and separated from it by a mere imaginary line, was the City of South Omaha, which had in 1903 a population of 31,000 (Record, p. 436). On the bottom lands to the eastward of the original limits of Omaha is the community, actually a part of Omaha, but separately designated as East Omaha, while west of Omaha and on the hills is another small community, called Dundee. The situation suggests the ultimate consolidation of these separate municipalities, and there is already on the statute books of Nebraska a law providing for the annexation of South Omaha to Omaha (Laws of 1905, Ch. 12a, Sec. 2).

South Omaha has been chiefly built up by packing industries organized by Omaha capital. It was settled about 1884, and was incorporated as a city in October, 1886 (Record, pp. 117-19, 123, 436, 528). So far as appearance goes, the City of South Omaha is not in the least separated from the City of Omaha. The streets of one community run into the streets of the other community, and there is no dividing line at the boundary. The street-car systems run from Omaha to South Omaha and *vice versa*. In the same way, the company's water system has no dividing line at the boundary between the two cities. So far is

this true that the first extension which the company made into South Omaha territory was actually ordered by the city council of the City of Omaha (Record, pp. 118, 529-530).

One reason why the company made extensions into South Omaha was because the packing houses, using large quantities of water, had been unable to obtain an adequate supply on their own account (Record, pp. 118, 124). It is undeniable that South Omaha and Florence and East Omaha and Dundee are all absolutely dependent on the Missouri River for their water. Dundee could not get its supply from the river without extending its system through Omaha, which would be too expensive for a small community; South Omaha could not safely take its water from the river south of Omaha for fear of contamination. Therefore, so far as the public benefit is concerned, the entire neighborhood, including all the municipalities, must depend on the same source of supply and be furnished from the same system.

Extension of the Company's System.

About the time the company had determined to build a new pumping station and reservoirs at Florence, Florence was a city, but nevertheless a small community.

The relations of the company to the City of Florence were early the subject of negotiation, which resulted in a contract by which that city closed certain streets, in order to enable the reservoirs to occupy the requisite space, agreed to protect the company's reservoirs and plant from trespassers and from damages and to furnish police therefor, and gave the company certain railroad trackage facilities, in order that its coal and

supplies might be unloaded at the company's doors, and furthermore gave to the company the right to lay through the streets of Florence its huge mains which were to supply Omaha and South Omaha. In return for this the company agreed to supply fire protection through hydrants, and water for general purposes of the community, at the rates in force in Omaha, for fourteen years. This contract went into effect in September, 1887, and was supplemented by ordinances passed in August, 1889 (Record, pp. 719, 714, 423, 717, 720, 718, 713).

The Florence contract was renewed for twenty-five years on November 14, 1903. An important feature of the original contract and of this renewal contract was that the rates to be charged for hydrant rental and also to private consumers were to be identical with those charged in Omaha (Record, pp. 426-7).

By Ordinance No. 29, passed October 17, 1887, the City of South Omaha made a contract with the American Water Works Company for a supply for the regular municipal and private purposes (Record, pp. 236, 420). The contract gave an extensive franchise to the company for seventeen years, expiring in 1904 (Record, p. 420), but a condition of the franchise was that South Omaha and its inhabitants should get their water supply on the same terms as the company's contract with Omaha provided. This franchise was renewed in the shape of a contract, Ordinance No. 1154 (Record, p. 421), as amended by Ordinance No. 1181 (Record, p. 422). The renewal period was for ten years from 1904.

Both the Florence and the South Omaha contracts will, of course, inure to the benefit of the

City of Omaha on the completion of its purchase of the water works system.

On September 7, 1889, the local authorities of Dundee passed a resolution authorizing the company to extend its mains into that village (Record, p. 433). Afterwards, on December 22, 1900, it made a contract for fire protection through six hydrants (Record, p. 485).

A year later, the East Omaha Land Company, a private corporation, operating on land which was supposed to be a part of Omaha, but as to a small part of which there was a dispute as to whether, owing to a change in the direction of the Missouri River, it was in Iowa or Nebraska, made a contract with the company for fire hydrants and a general water supply. This contract in return had for its conditions the same provisions as to rates that were in the contract with Omaha (Record, p. 428).

Internal Affairs of the Company.

The original contract made by the city was with Locke individually, but before 1883 he had assigned to the City Water Works Company, and this assignment was expressly agreed to by the city (Record, p. 338). In order to raise a part of the funds necessary to construct the system the City Water Works Company mortgaged its property and issued \$400,000 of bonds (Record, p. 205).

As the community grew, the City Water Works Company assigned its contract and transferred its property to the American Water Works Company of Illinois (Record, pp. 666, 690). This took place on July 1, 1887, and the assignment was expressly

ratified by the city on December 20, 1887. In March, 1891, the Illinois Company transferred its contract and property to the American Water Works Company of New Jersey (Record, pp. 670-673). Meantime, and on July 1, 1887, and January 16, 1889, the Illinois Company had mortgaged its property to the Farmers' Loan & Trust Company (Record, p. 261). The original mortgage expressly included the contract and all the company's property in Nebraska. It was for \$4,000,000, but sufficient of the bonds were reserved to take up the \$400,000 of bonds still outstanding which had been issued by the City Water Works Company. The later mortgage was supplemental to the original mortgage.

The next important event was the foreclosure suit by the Farmers' Loan & Trust Company, trustee of the mortgages, which resulted in a sale of the property on July 16, 1896, and its purchase by the trustee, acting for bondholders requesting the purchase. The important feature of the master's deed bearing that date is that it includes specifically, not only all the real property (except such, if any, as was situated in Iowa in connection with the East Omaha enterprise), but also all the personal property, and especially all the right, title and interest which had at any time theretofore been vested in, or held or enjoyed by, the American Water Works Company of Illinois and the American Water Works Company of New Jersey, or either of them, under the ordinances of Omaha, South Omaha and Florence, and under the contract with Locke, "or in any other wise acquired" (Record, pp. 235-6). All the parts of the foreclosure record which are essential to show the devolution of the company's title form a part of the

record in this case. They can be found at pages 260, 305, 316, 319, 337, 338, 339, 341, 362, 363, 364 and 232.

From the foreclosure record it appears that the appraisers appointed by the Court to value the property for sale, fixed, in 1894, a gross value, for the whole system and the contract, of \$5,500,000 (Record, pp. 349-350). The property was bought in by the trust company for four million nine thousand five hundred dollars, subject to the underlying mortgage of \$400,000, making the total cost, apart from legal expenses, \$4,409,500 (Record, pp. 342-6).

The Farmers' Loan & Trust Company conveyed the property to The Omaha Water Company, respondent herein, a new corporation formed by a bondholders' committee. The title passed July 23, 1896 (Record, p. 191).

The Omaha Water Company mortgaged the property, franchises and contract by two mortgages, one known as the prior lien mortgage, and one known as the consolidated mortgage. The prior lien mortgage, due 1916, secured bonds to the amount of not more than \$1,500,000, of which bonds to the amount of \$440,000 were reserved to take up the old City Water Works bonds. All the bonds issued under the prior lien mortgage are redeemable at any time at the option of the company at the price of 105 (Record, p. 201). The consolidated mortgage, due 1946 (Record, p. 217), secured bonds to the amount of not more than \$6,000,000, including bonds to the amount of \$3,600,000 issued toward paying in part for the property, \$650,000 for subsequent additions; the remaining bonds to the amount of \$1,750,000 being issuable only to take up the issue of prior lien bonds. The

total possible bonded indebtedness of the company, including the old City Water Works bonds, the prior lien mortgage bonds and the consolidated mortgage bonds, was, therefore, limited to six million dollars. The consolidated mortgage bonds are redeemable at any time at 105 at the option of the company (Record, pp. 218, 222).

The Forfeiture Suit.

On July 13 1896, a few days before the execution of the master's deed to the Farmers' Loan & Trust Company, the City of Omaha began a suit to compel a forfeiture of the contract under Section 11 of Ordinance 423, above quoted, and to procure the acquisition by the city of the property under that forfeiture clause. The bill of complaint in that suit was drawn with the greatest care and attention to every detail (Record, pp. 663-680). The Omaha Water Company was made a party on March 22, 1897 (Record, p. 368), and joined issue (Record, p. 700).

The issues raised by the bill in the forfeiture suit were, briefly, that the Illinois Company had mortgaged the water works without the consent of the city and had suffered the works to pass out of its possession, and had failed to keep the plant in good order, and to furnish suitable or adequate service, and had therefore forfeited all its contract rights; and that the city had the right to the entire water works system, both within and without the City of Omaha, and all the contract rights connected therewith.

The verified bill of complaint alleged that all the tangible property described in the mortgages under the foreclosure was "absolutely essential

to the operation of the said water works and to the performance of its public duty so as aforesaid then lying and being on said American Water Works Company, and that without the same and every part thereof, the said American Water Works Company could not perform its obligations nor fulfill its said contract." (Record, p. 669.)

The prayer of the bill contains this language (Record, p. 679) :

"And your orator further prays that it may be adjudged, decreed and determined that your orator has a right to take the immediate possession of all the tangible property of the water works plant of every kind and nature, including all of the property hereinbefore more particularly described in said decree of foreclosure."

One interesting element in this suit is the city's allegation that the plant, property, contract and franchise of the company were then worth more than \$7,500,000 (Record, p. 675). This allegation in the bill is made without any qualification as to information and belief. It is made as a statement of fact. The bill subsequently made certain allegations as to the extent of the company's revenues, those allegations being made on information and belief.

The Bond Vote of 1900.

There was some reason to dispute whether the twenty years at the end of which the city could exercise its option to purchase the water works, dated from the completion of the works or the making of the contract. If it dated from the making of the contract, the twenty-year limitation

would expire June 11, 1900, otherwise it would expire September 4, 1903. With a view to a purchase, proceedings were had in March, 1900, by which the citizens of Omaha voted an issue of \$3,000,000 of city bonds for "the purpose of appropriating or purchasing water works." The record herein shows these proceedings in full. The important fact in this litigation is that the bonds were voted for such purchase (Record, pp. 172-183).

Legislation of 1903.

Nothing further was done toward a purchase of the company's water works during the period between 1900 and 1903. In 1903 the State of Nebraska, at the instance of the City of Omaha, or some of its citizens, passed an act, general in form, as referring to metropolitan cities, but specific in effect, because the only metropolitan city in Nebraska was the City of Omaha, the title of which provided for the procedure by the mayor and council in the acquisition of a municipal water plant, and for the creation of a water board, and amended certain sections of the charter of metropolitan cities. In general, it provided (disregarding the fictitious reference to cities of the metropolitan class) that inasmuch as the City of Omaha had voted bonds for the purchase of a water plant, the mayor and council should, within thirty days after the act went into effect, declare by ordinance that it was necessary and expedient for the city to construct or purchase a system of water works, and should, beginning with the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant, either under the powers granted by the charter of such city or by virtue of any rights

inuring to such city through contract or otherwise (Laws of 1903, Chapter 12, Sections 1 and 3).

On February 24, 1903, the city council, acting in conjunction with the water board, as prescribed in this act of 1903, passed its Ordinance No. 5162, approved by the Mayor March 2, 1903, reciting the act of the legislature and ordaining that, in pursuance of that act, the mayor and council declare "that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights inuring to said city through the contract between said city and the grantors of said water company, and as authorized and provided by Section 14 of the Ordinance No. 423" (Record, p. 159).

Thereafter, the city council selected, as one of the appraisers, for the purpose of ascertaining the valuation of said water works plant, John W. Alvord, of Chicago, an engineer of high standing and a specialist as a sanitary engineer (Record, pp. 42, 44, 56); and the water company selected, as the second appraiser for such purpose, George H. Benzenberg, of Milwaukee, holding also a prominent position in Cincinnati, an engineer in the front ranks of municipal engineers, and later president of the American Society of Civil Engineers (Record, pp. 41, 43, 51, 58-9, 64, 67); and these two appraisers, in pursuance of Section 14 of Ordinance 423, met in Chicago on June 18, 1903, and selected, as the third appraiser, Daniel W. Mead, of Chicago, an eminent specialist in regard to water works, and professor of engineer-

ing in the University of Wisconsin (Record, pp. 41, 43, 52, 58, 60, 64, 66, 14, 25, 161).

The First Part of the Appraisal.

The three appraisers met and organized in the office of the water board in the City of Omaha on July 20, 1903, Mr. Mead being appointed chairman and Mr. Alvord secretary. The meeting was public and was attended by various representatives of both the city and the company.

Evidence of the course of procedure on the appraisal appears in the record herein, as follows:

(A) *For the Company*—R. S. Hall, pp. 141-148; and Francis H. Marshall, pp. 128-129.

(B) *For the City*—Isaac E. Congdon, pp. 133-141 and pp. 449-473; George W. Craig, pp. 148-156, and pp. 441-443; James E. Boyd, pp. 473-485; C. C. Wright, pp. 487-498.

(C) *For the Appraisers*—Their report, pp. 159 and ff.

While the report of the appraisers is not testimony, its correctness is not assailed, and it may be read first as showing the unadorned facts of the course of the appraisal. It appears from the report:

“Said board, so organized, thereupon received such testimony, plans, blue prints, inventories and other matters pertaining to the property of the Omaha Water Company, and to the value thereof, as were submitted, by various parties interested, for the purpose of fixing and determining the value of such water works.

A large number of meetings were thereafter held by said board, during which time many hundreds of plans and blue prints, and several hundred pages of inventory were submitted by said Omaha Water Company and by the City of Omaha. Many days were occupied in the receipt of a large amount of evidence, all taken under oath and covering about two thousand pages of typewritten matter.

The sessions of the board for the receipt of such evidence were concluded on December 31st, 1904, the board of appraisers in the meanwhile, by numerous visits to all of the several parts of the water works plant, and by various excavations and examinations, having thoroughly familiarized itself with the several constituent parts of said plant, and with its various appurtenances, and as to the physical condition of the same.

Upon the conclusion of the hearings, the board proceeded to tabulate the evidence, and to appraise the property considered, until on the 8th day of July, 1905, when the board was enjoined by the Circuit Court of the United States of the District of Nebraska from completing said appraisement" (Record, p. 161).

At the outset, Mr. C. C. Wright, then City Attorney, submitted in writing an outline of the plan of procedure suggested on behalf of the city. This document drew attention to the fact that the company owned and operated a system of water works by which it was supplying with water not only the City of Omaha, but also South Omaha, Dundee, Florence and East Omaha, and suggested that the appraisement should be in detail, so far as practicable, giving the values of the different items of tangible property owned by said company under proper classification; also a separate valuation

upon its value as a going concern, if any should be determined, and also that there be a separate valuation upon that part of the system claimed to be strictly appurtenant to Omaha, and of the properties located outside the city, and, if the company desired, in addition, a single valuation of the system as a whole.

On the subject of procedure, it said:

"4. As to the matter of the procedure to be adopted by your board as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. *As to the method of arriving at the amount and condition of the property of the Water Company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter.* It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must be submitted upon the examination of the property" (Record, p. 144).

In this view of the functions and powers of the appraisers, the counsel for the Water Company agreed.

The appraisers unanimously permitted the company to make its own inventory and to have as much time as was necessary for that purpose. As the record shows, the company had inherited no previous inventory, and difficulty was had in getting a suitable man to make an inventory, and it took more time than was expected to get possession of the details. It is not denied that the inventory, when finished, gave a complete and accurate statement of the property owned by the company.

The inventory consisted of a thousand or more plats, diagrams, schedules and descriptive matter (Record, p. 147). By arrangement with the City Attorney, copies of all these were submitted to the city, and opportunity was given the representatives of the city to verify the facts. In cases where verification proved to be impossible, the men who were familiar with the items were produced before the appraisers, and gave testimony in accordance with such arrangement. The record of such testimony, together with the arguments of counsel, made some 2,000 typewritten pages (Record, p. 147). The witnesses who gave these facts appeared, of course, voluntarily, as the appraisers had no authority to summon them, or to administer oaths, but it was agreed that they might be sworn, and their testimony was taken down by stenographers.

Some idea of the extent of the work is to be had from the cost of the appraisal to the company, exclusive of legal fees (Record, p. 130). This amounted to \$26,959.09, including payment for ninety-seven days' work to Benzenberg and one-half of the compensation of Mead for the same number of days. The remaining cost was vir-

tually all for the expense of getting up the inventory. It is safe to say that this expense amounted to at least \$12,000.

The general propriety and necessity of the schedules and blue prints prepared by the company are indicated by the testimony of four experts called by the company in this specific performance suit, and are conceded by Mr. Congdon, the lawyer member of the water board. The experts were Messrs. Cole, Randolph, MacHarg and Rundlett (Record, pp. 49 and ff. 58-9, 63-6, 68, 469, 471-2),

By the time the inventory had been completed and explained, it was the end of December, 1904. The representatives of the company and the city then propounded their theories of how the report of the appraisers should be made out and the valuations determined. But the amount of property was practically fixed and actually agreed upon as the result of the careful work of preparing and proving the inventory. Thereupon the matter was left to the appraisers for their further independent investigation and determination.

Practically no values had been stated by any witnesses. Mr. Wright, departing somewhat from his proposal, did produce witnesses as to the values of some parcels of real property, and there was a small amount of expert testimony as to the cost of a certain grade of stone and of certain other materials going into the rip-rap on the Missouri River; but otherwise no testimony as to valuations was given on either side.

On the last public hearing before the appraisers, the chairman of the board, with the assent of the other members, announced that, with the closing of what might be termed the formal evidence, the

real work of valuation was only just begun; that it would take a long time to examine in detail the various schedules and weigh the evidence presented, and examine the arguments; that "*undoubtedly much more information must be sought by the board than that already presented;*" and that the board would "*undoubtedly wish to call on the city and the company for special information as to details,*" the necessity for which would develop as the work proceeded; and finally, that it was "not a work of days or of weeks, but of months" (Record, p. 148).

Counsel for the company at that public hearing before the appraisers, at which counsel for the city were present, announced that all the books and vouchers and other papers of the water company were open for examination by the appraisers for their exclusive and confidential information, for the sole purpose of this appraisal (Record, p. 658).

In line with the suggestion that they might wish to call on either the company or the city for other information, the three appraisers went to the company's office on the day following the last public hearing and made a preliminary examination of the company's books, stating that they would get at the exhaustive examination of the books at some later time. Mr. Alvord, the city's appraiser, participated in this examination (Record, pp. 108-9).

The Appraisement Suit.

While the appraisers were still engaged on the task of fixing the valuation from the information they had obtained through the hearings and from the company's inventory, and through their per-

sonal investigation, they were induced by the city's representatives to go to Omaha (Record, pp. 464-5), and were thereupon served with process in a suit to enjoin them from continuing their appraisal, and to procure from the court specific directions as to how the appraisal should ultimately be made. The date on which this suit was begun is July 7, 1905. Both the water board and the city were the complainants, and the appraisers and the water company were the defendants (Record, p. 369).

It should be stated, in connection with this suit, that, by amendments to the Charter for Metropolitan Cities, enacted by the Legislature of Nebraska in 1905, apparently at the instance of members of the water board (Record, p. 465), control over the entire affairs of the city which related to the water supply had been transferred from the mayor and council to the water board (Record, p. 463). The essential features of the Act of 1905 are set forth in an appendix to this brief.

A temporary restraining order was obtained from Judge Munger on July 7, 1905 (Record, pp. 392, 481), and the appraisers were thus obliged to desist from their labors until further order of the court.

Meantime the case progressed. The company served an answer (Record, p. 394), taking issue with the water board. This answer was filed September 4, 1905.

This case has been known among the parties as the appraisalment suit. The bill of complaint set up an elaborate history of the water works and of the relations between the city and the company, and of the contract giving the city an option to buy the plant, and of the exercise of that option,

and of the progress of the appraisal until interrupted. In this historical statement the allegation was made (Record, pp. 372-3) that the company owned the entire plant which was operated by it at that time. This may be of some importance when it comes to considering objections to the company's title which have been raised in the present suit.

The bill then stated that, by reason of legal questions and of disagreement among the appraisers, and also between the city and the company, there ought to be a judicial determination of some of the questions between the various parties. Such questions it stated in the form of assertions that the claims of the company and the intentions of the appraisers were contrary to the law, and asked that the appraisers be instructed in the law.

The scope of the suit is manifest from the matters which the court was asked specifically to decide:

1. That the City of Omaha had no power to purchase, own or operate any part of the water works system lying outside the city limits and used in supplying the municipalities of South Omaha, East Omaha and Dundee.

2. That under Ordinance 423 and its amendments, the City of Omaha was required to purchase only that part of the water works which was within the City limits and such part of the said water works lying within Florence as was necessary and appurtenant to the use and operation of the water works for the supplying of Omaha with water.

3. That the appraisers should be directed to value the property as of the date of the award, or, in the alternative, as of the date of the submission, so called, to the appraisers.

4. That there must be no valuation of Governments lots 2, 3 and 4, in the City of Omaha, and the streets and alleys surrounding and within the lots and blocks belonging to the company at its Burt Street station.

5. That there must be excluded from the valuation the streets and alleys in Florence formerly underlying the lots owned by the company and occupied by its reservoirs.

6. That there must be excluded from the valuation the value of the right of way to the St. Paul Railroad, adjoining the company's reservoirs in Florence.

7. That from the valuation must be excluded the value of certain twenty-five acres of vacant land, owned by the company, near Krug's Park.

8. That there must be excluded from the valuation Lots 17 and 18 in Block 2 of Armstrong's Addition.

9. That a separate valuation must be returned of certain lots in Florence within the limits of the reservoirs, as to which it was claimed by the city that there was a dispute over the title.

10. That from the valuation should be excluded such increased value as may have arisen from the fact that, in order to supply South Omaha and other suburban communities, the mains were larger than they would have to be to supply Omaha alone.

11. That there should be excluded from the valuation the value of the Poppleton Avenue pumping station.

12. That there should be excluded from the valuation the cost of building up land and constructing rip-rap on the Missouri River, except so much thereof as the appraisers should find to be **absolutely necessary** for the protection of the company's property.

13. That there should be excluded from the valuation any sum for "going value" (Record, pp. 389-390).

Virtually all of the testimony taken in the appraisalment suit—continuing as late as June 16, 1906 (Record, p. 528)—has been incorporated as evidence in this record. The appraisalment suit never reached a final hearing, but an order was entered in November, 1905, upon the opinion of Judge Munger, the judge who tried the present case at Circuit. In his opinion (Record, p. 499) he said that the city evidently expected, in passing its ordinance of election in March, 1903, to purchase the whole property (Record, p. 500). He said, however, that he deemed it advisable to direct that the appraisers make their report in such form that the more important questions raised in the appraisalment suit might ultimately be determined in the suit for specific performance which would undoubtedly have to be brought. He pointed out that, if he failed to give such an order, the entire appraisal might possibly thereby be invalidated, because it might be determined that some item could not be taken over by the city, and there would be no record to show how much that item was worth. He intimated that the

pipe distribution in Florence would in any event have to be taken over, because the City of Florence would insist on that as part of the consideration for permitting the supply mains to Omaha to run through some of its streets, and for vacating other streets for the pumping and supply station. He expressly held that there was no merit in the contention of the city that in order to supply South Omaha, Dundee and East Omaha, the mains had been made too big for the uses of the City of Omaha, and declined to permit any deduction to be made on that account. As to the lots which it was alleged belonged to the City of Omaha, being Government lots 3 and 4, and inferentially as to the streets and alleys in Omaha, and the streets, alleys and disputed lots in Florence, he said that the company had used them so long that they were part of the company's plant and were to be valued irrespective of where the actual legal title stood (Record, p. 501).

His order, therefore, provided (Record, p. 502) that the appraisalment be made to include, separately:

- (1) Value of the system as a whole.
- (2) Value of that part of the system appurtenant to Omaha.
- (3) Value of the 25 acres near Krug's Park.
- (4) Value of the two lots of Armstrong's Addition.
- (5) Value of the company's property in South Omaha.
- (6) Value of the Company's property in East Omaha.
- (7) Value of the company's property in Dundee.

(8) Value of the company's property in Florence.

(9) Going value of the whole system.

(10) Going value of the part of the system appurtenant to Omaha.

(11) That, in accordance with the city's contention, the valuation be made substantially as of the date of the report.

Further Examination of the Company's Books.

After the order of November 29, 1905 was entered, the appraisers resumed work.

On January 3, 1906, Mr. Mead, as chairman of the board of appraisers, wrote a letter to the company stating that the board would next meet February 7, 8, 9 and 10, at Cincinnati (where it appears that Mr. Benzenberg was consulting engineer of that city with respect to its municipal water works), and asking the company to send its books to Cincinnati at that time (Record, p. 156). The city learned of this request, there being no concealment of the company's continued readiness to submit its books to the appraisers (Record, p. 171), and on February 3, 1906, wrote to the appraisers a letter referring to the original statement on behalf of the company in that regard, but insisting that, if the appraisers were to examine the books, the city should have an opportunity to be present when the books were examined, and to make a personal examination either by its attorneys or by an accountant "of all the matters and things in said books" (Record, pp. 170-171).

The books were sent as requested, and Mr. Fairfield, the general manager of the company, and Mr.

Heth, the treasurer of the company, went to Cincinnati to be there at the time of the meeting. Mr. Fairfield saw some of the books opened in the room where all the appraisers were. Mr. Heth did not attend any of the meetings. Mr. Fairfield had no conversation with the appraisers bearing on anything in the books. He was informed by them that the city had protested against this private submission of the books. He replied that he did not see why the appraisers were not at liberty to receive any information they chose to use, and that the information contained in the books was confidential, and that this method of offering the information was supported by precedent, adding that such had all along been the company's attitude (Record, p. 107).

The books consisted of the journals, ledgers, cash books and voucher registers from 1896 to 1905, being at least 30 volumes. The appraisers decided upon an expert examination of the books, and accordingly directed the chairman to send the books to Chicago to be verified by an auditing company. Mr. Heth was requested to present himself at Chicago, in order to explain the books to the auditor, if required. He went to Chicago and had two or three interviews with Mr. Mead, but not with reference to any items in the books. The books were handed over to an auditing company, and Mr. Heth from time to time was asked questions, but never volunteered any information and merely answered the queries that were made of him. No representative of the water company was present during any examination of the books of the appraisers, and none has even seen the report made by the auditor. There is nothing in the record which throws any

light on the nature of the auditor's report, or the use made of it by the appraisers. There is no intimation that the books were inaccurate, or that the appraisers obtained any untrustworthy information therefrom. Considerable testimony as to the books appears in the present case (Record, pp. 69, 86-90, 152-157, 476-484, 657-663).

As will be seen later, the trial judge dismissed this specific performance suit on the ground that the private examination of the books by the appraisers was improper.

It appears that from time to time while the appraisal was pending, the water board, through its chairman, and evidently through the city attorney also, was in communication with the appraiser selected by the city, discussing matters of valuation and arguing other questions in connection with the appraisal, without notice to the water company or its counsel, and without treating the proceeding before the appraisers as in any sense an arbitration. (Record, pp. 85-87, 569, 481-485.)

Coming in of the Appraisers' Report.

In anticipation of the report of the appraisers, the board of directors of the water company met on June 14, 1906, and formally authorized the president to execute a deed and convey the company's property to the city at whatever valuation should be fixed by the appraisers in their report (Record, pp. 183). The deed was prepared in New York and completed in Omaha, and was executed by the president (Record, pp. 35 and ff., 128-129). About July 6, Mr. Wright, the attorney for the city in the appraisal proceedings,

got word from Mr. Alvord that the report of the appraisers was to come out on July 7. He accordingly went to Chicago by direction of some or all the members of the water board (Record, pp. 85-87). The report was signed July 7, and was in the form directed by Judge Munger (Record, p. 159). It made the separate appraisals that were called for by the Judge's order. The important feature is the appraisal of the whole system at the sum of \$6,263,295.49 (Record, p. 164). Mr. Wright telegraphed to Mr. Barlow, chairman of the water board, from Chicago (Record, pp. 82 and 85), and took the night train for Omaha. On Sunday morning, July 8, all the members of the water board, together with Messrs. Webster and Wright, got together to receive Mr. Wright's report. It does not appear that he had a copy of the report, but he had all the necessary information which it contained. It was decided that the board should claim and undertake to exercise authority under the law of 1905 to reject the appraisal, and a resolution was drawn up for that purpose (Record, p. 166). It was arranged that the formal meeting, which the act constituting the water board requires to be public in every instance, should be held on Monday, but that no discussion should be had thereat (Record, pp. 88-89).

The report of the appraisers was signed by Messrs. Mead and Benzenberg, but Mr. Alvord, in signing (Record, p. 165) said:

"I do not concur in the above report, nor in the values as fixed therein".

City's Refusal to take the Property.

The report of the appraisers was received by the secretary of the water board on July 9, 1906,

(Record, pp. 110-111). The company also received a copy of the report on that same day, and Mr. Woodbury, the president of the company, then called on the mayor of the city and on Mr. Barlow, the chairman of the water board, and tendered the deed and demanded payment. The deed which was tendered was a deed of all the company's property, of every shape and kind, including not only the property described in the master's deed, but all after-acquired property (Record, p. 723).

The water board met formally in the evening of July 9, (Record, pp. 111-112), and, without comment, passed the resolution already agreed upon (Record, p. 166).

Specific Performance Suit.

Upon the refusal of the city to complete the purchase, this suit was begun to compel the city to take the property, and the entire property, and to pay therefor the price fixed by the board of appraisers as stated in their report, namely, \$6,263,295.49.

The bill of complaint set up such facts out of those heretofore explained as were necessary for the bill, and demanded judgment that the city be compelled to perform its part of the contract. The answer, dated September 3, 1906 (Record, p. 33), was not filed until after a meeting of the water board had been held (Record, p. 721), at which, in furtherance of its resolution to reject the appraisal, the board pretended to order a new appraisal and the appointment of a new appraiser. When it came to the answer, however, the counsel for the city plainly showed that it was their purpose to get the city out of the contract altogether.

The answer contains a number of denials which need not be noticed, and also contains what might be termed affirmative defenses, which substantially repeat the grounds upon which the resolution of the water board based the declared rejection of the appraisers' report. It was upon these affirmative defenses that the city depended. They begin at paragraph 15 (Record, p. 25).

After the testimony was all in, this case proceeded for final hearing and argument before Judge Munger on May 13, 14 and 15, 1907, the case being submitted on the last named date. On June 4, Judge Munger handed down his opinion, in which he expressly declined to touch on any subject except that of the examination of the books by the appraisers at Cincinnati and Chicago, against the protest of the city. He said (Record, p. 186):

“Undoubtedly the water company was not required, if they did not see fit, to offer their books as evidence, or permit them to be examined by the appraisers, but when they offered them to be examined by the appraisers it should have been done as any other evidence is offered, so as to afford the opposite party an opportunity to cross-examine or controvert.

The award being invalid for this reason, it follows that the relief asked by complainant must be denied. *As the case will doubtless be appealed, I do not express my views upon the other questions raised and fully argued.”*

Judgment was entered accordingly, on June 29, from which an appeal was taken by the company to the Circuit Court of Appeals (Record, p. 189).

The appeal was argued January 7, 1908, and on April 7, 1908, a decision was rendered revers-

ing the decree below and remanding the cause for proceedings in accordance with the opinion of the court.

The syllabus of the reported decision is as follows:

"1. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—ASCERTAINMENT OF VALUE BY APPRAISERS—VALIDITY OF APPRAISAL.

A city ordinance granting a franchise to a water company reserved to the city the right, at its election, to purchase the works of the company after a stated term at an appraised valuation 'ascertained by the estimate of three engineers, one to be selected by the city council, one by the waterworks company and these two to select a third.' The city having elected under authority of a state statute to exercise its option, appraisers were selected as therein provided, who organized as a board, and, after an investigation extending over three years filed a report fixing the value of the property, which was signed by two of the number, but upon which the third noted his dissent. *Held*, that the matter in question was one of public concern, and that, under the rule of law applicable in such case, the appraisers having all qualified and acted throughout, the decision of the majority was a valid exercise of the power.

2. PROCEDURE BY APPRAISERS.

The fact that appraisers selected to make a valuation of the property of a water company, which a city had elected to purchase under an option reserved in the company's franchise, took the oral testimony of witnesses who were examined by counsel for the respective parties, did not limit them to such

method of procedure throughout, where it was understood and agreed by the parties in the beginning that they might arrive at the facts by any method or means deemed advisable by them, and their subsequent action in causing the books of the company to be sent to another city where they were in session, and to be there examined by experts, in the absence of counsel, did not invalidate their appraisal where their good faith was not questioned.

3. SAME—POWERS OF APPRAISERS—DISCRETION AS TO METHODS OF PROCEDURE.

A valuation of property by appraisers selected as experts under a contract for its sale is not an arbitration, and the appraisers do not act judicially, nor are they bound by the rules relating to arbitrations, but, so long as they act honestly and in good faith, they have a wide discretion as to their methods of procedure and sources of information.

4. MUNICIPAL CORPORATIONS—POWERS—PURCHASE OF WATERWORKS—CONSTRUCTION AND VALIDITY OF CONTRACT.

In 1880 the city of Omaha granted a franchise to a water company under Laws Neb. 1879, p. 99, Sec. 27, which authorized the city to construct and maintain waterworks 'either within or without the corporate limits of the city,' and to contract with others to construct and maintain waterworks on such terms as might be agreed upon. In the ordinance granting such franchise, the city reserved the right to purchase the works of the company after 20 years at an appraised valuation. By a subsequent statute, still in force in 1903, the city was authorized to appropriate private property for waterworks purposes, or any system already constructed, the power

to extend a distance of 10 miles beyond the city limits. Laws 1903, p. 66, c. 12, required the city to either construct or purchase water-works and authorized it to take the necessary steps to acquire such water plant 'by virtue of any rights inuring to such city through contract or otherwise.' In 1903 the city elected to purchase the company's plant under the option reserved in the ordinance of 1880, and appraisers were selected by the parties to make the valuation. When the works were constructed, it was necessary to take the water from the Missouri river above the city, and the intake, pumping station, and reservoirs were located in the town of Florence, and some miles outside the city limits. Between that time and 1903 the city had grown in population from 30,000 to 125,000 or more; the adjoining city of South Omaha containing over 30,000 population, and other adjoining, but separate municipalities had grown up, into all of which, including the town of Florence, the company had extended its distribution system which was supplied with water from its station at Florence. *Held*, that, under such statutes, the city had power to acquire the property of the company outside, as well as inside, of its limits, and that, when it made its election, it elected to purchase the entire system, and could not require the company to sell its pumping plant and the pipes connected therewith which extended into and lay within the city limits, and to retain its outlying distribution systems.

5. CONSTITUTIONAL LAW—CONTRACTS PROTECTED FROM IMPAIRMENT—CONTRACT BY CITY.

The election by a city, expressed by ordinance duly authorized by statute, to exercise an option reserved in a prior ordinance to purchase the property of a water company,

which ordinance was accepted by the company, creates a contract binding on both parties, and which cannot be impaired by any subsequent action of the city or of the Legislature of the state taken after the property has been appraised as provided by such contract.

6. WATERS AND WATER COURSES—CONTRACT BY CITY FOR PURCHASE OF WATERWORKS—VALIDITY OF APPRAISAL.

An appraisal of a large system of waterworks under a contract of purchase will not be invalidated because the title to a small part of the property not vital to the integrity of the system is afterward found to be defective, nor because it may include pieces of property not necessary to the system; a court having power to make an equitable adjustment of such matters between the parties."

POINT I.

There was no misconduct, nor any improper procedure, on the part of the Board of Appraisers in the examination of the Water Company's books.

1. There was no concealment nor any secrecy with respect to such examination.

The company's position in this regard was clearly and firmly stated by its counsel at a public hearing before the board of appraisers, in the presence of counsel for the city, as follows:

"Now for the water company we desire to say that all the books and vouchers and other papers of the water company are open for examination by the appraisers for their exclusive and confidential information for the sole purpose of this appraisal, and are offered by the water company for that purpose" (Record, p. 658).

The record shows that on the day after the taking of oral testimony closed, the three appraisers went to the water company's office and made a preliminary examination of the company's books, learning specially the company's method of book-keeping, a fact of which counsel for the city were informed (Record, p. 658).

After the injunction obtained by the city in the appraisement suit, staying for some months the proceedings of the appraisers, had been lifted, the company's books of account were sent, on written request of the chairman of the board, to Cincinnati, where the next meeting of the board was to be held (Record, p. 156). It appears that Mr. Benzenberg, one of the appraisers, held a prominent position in Cincinnati, in connection with the water works of that city (Record, pp. 41, 103). Meetings of the board were also held in Chicago, where Mr. Mead and Mr. Alvord, the other appraisers, had offices (Record, p. 103).

There was no concealment about the examination of the books. There could have been none, since it appears that from first to last no meeting of the appraisers was held, no examination of property or inspection of the books made, and no step in procedure taken, without the knowledge and concurrence of the appraiser selected by the city. The city was also advised of the company's intention (Record, p. 171). Notice of the pro-

posed examination of the books was given to counsel for the city, presumably by this appraiser, and the boxes containing the books were opened in the presence of this appraiser (Record, p. 95).

The water company was not represented by counsel then, or at any time while the books were in the possession of the board of appraisers, but through its general manager adhered to the position previously publicly stated, that the company declined to allow counsel for the city to inspect its books, claiming that if the appraisers desired to inspect the books, the inspection by all of the appraisers was a sufficient representation for the city (Record, pp. 107, 132).

The books consisted of general ledgers, journals, voucher registers and cash books, thirty or forty books in all, covering the business of the company for nine or ten years (Record, p. 99).

The general manager and treasurer of the company were present in Cincinnati, at the request of the appraisers, to give any information that might be desired with regard to the books (Record, p. 93), but only the general manager appeared before the appraisers, and he was not present at any discussion or conference of the board. No questions were asked regarding the contents of the books, nor does it appear that any examination of the books was made at Cincinnati, where the books were left in the custody of the board. It appears from the evidence that when the books were placed in the possession of the appraisers, all of the appraisers were present (Record, p. 107).

Without consulting the representatives of the water company, the board of appraisers decided to submit the company's books to an audit com-

pany, and they were sent accordingly by the appraisers to the American Audit Company, of Chicago. At the request of the chairman of the board, the treasurer of the company attended at Chicago to give any information desired, but had nothing to do with auditing the books in any way (Record, pp. 96, 101, 104).

The report made by the audit company to the board was never communicated to the water company by the audit company, with whom the books remained for some two weeks (Record, pp. 101, 105).

There is no evidence in the case of what use, if any, was made of the audit company's report by the board of appraisers.

The books might, with entire propriety, have been examined by the appraisers in the company's office at Omaha, and with the aid of the company's bookkeepers, had the appraisers found it convenient to attend there. It was none the less proper for the appraisers to examine the books on neutral ground and with the aid of an auditor of their own selection. It was completely within the province of the appraisers to pass upon the facts which the books disclosed, and to make such use of the information as would aid them in the appraisal.

Upon all the facts disclosed by the evidence, the Circuit Court of Appeals has distinctly found that "there was no concealment" (167 Fed. 233).

2. The books were not offered in evidence in any technical sense.

The Circuit Court gave as its reason for dismissing complainant's bill:

"Undoubtedly the water company was not required, if they did not see fit, to offer their books as evidence, or permit them to be ex-

amined by the appraisers, but when they offered them to be examined by the appraisers, it should have been done as any other evidence is offered, so as to afford the opposite party an opportunity to cross-examine or controvert" (Record, p. 186).

This is clearly a mistaken view of the matter. The company never undertook to prove anything by the books, and never specified any particular purpose for which the books might be considered by the appraisers. No specific entries from the books were at any time drawn to the attention of the appraisers, nor was any testimony given regarding the contents of the books. The company was not in a position to know for what special purpose, or to what extent for any purpose, the appraisers would make use of the books. Manifestly, until specific entries from the books, or testimony with regard to their contents, should be formally offered in evidence for a definite purpose, no occasion could arise for cross-examination or contravention.

There could properly be no cross-examination of the books themselves. Their contents could not be changed. The only questions which could arise would be the question of their correctness and the question of what they showed. The first of these questions was settled by the board of appraisers through employment of an independent auditor. The second question was a matter for the judgment of the board. In the absence of testimony in support of the entries, there was no opening for cross-examination of any kind.

On a trial before the court, or in an arbitration, no general offer of evidence of books, papers and vouchers would be allowable, but, under the

circumstances of this appraisal, the company could scarcely have done less than to open its books and records to the examination of the appraisers. For it may well be doubted if "the water company was not required, if they did not see fit, to offer their books in evidence, or permit them to be examined by the appraisers." It was quite within the province of the appraisers to go to the company's office at any time and ask for any information from its books, without notice to counsel for either party—a privilege of inquiry to which the city was certainly not entitled. The proffer on behalf of the company was merely to the effect that the appraisers were welcome to do this, provided that the information obtained should be used for the sole purpose of the appraisal.

Any other course would obviously have been impracticable. It would have involved the specific offer of all the numerous and voluminous books, to become a part of a record without knowledge or intimation of how much of their contents would be deemed by the appraisers relevant or useful. It would virtually have necessitated the presence of the counsel for both parties during the deliberations of the appraisers concerning the entries which they might deem important, with consequent discussion of the extent to which the appraisers might avail themselves of the information. In other words, it would, without warrant, have transformed the appraisal into a continuous judicial trial, and have made such an appraisal as was provided for in the ordinance impossible.

3. The company was entirely within its rights in restricting the examination of its books to the sole purpose of the appraisal.

It would be an unheard-of thing—certainly unknown in appraisals of this character—to permit the representatives of the city to explore “all the matters and things” (Record, p. 171), in the books of the company pending the appraisement, with consequent freedom to use, for purposes outside the appraisement, including other litigation, the information thus gained. The city would thus be put in possession of a complete knowledge of the company’s business affairs—really a valuable part of its property—without payment of any compensation whatever. Having acquired this important advantage, the city could retain and use it adversely, while refusing—as it is refusing—to take over the works and pay the price and thus complete the purchase.

This Court can take judicial notice that at the time these books were examined by the appraisers, there was a controversy between the water company and the city with respect to an attempted reduction of rates to private consumers, which the company contended would impair a subsisting contract, but in which the city moved nevertheless to compel the production of the company’s books in support of the reduction. The city’s motion was denied, and the company’s main contention was sustained by the Circuit Court of Appeals, and an appeal from its decision was dismissed by this Court, and a writ of certiorari was denied.

Omaha Water Company v. City of Omaha, 147 Fed. 1, 15;

The City of Omaha v. Omaha Water Company, 207 U. S. 584;

Fairfield, et al. v. United States, 146 Fed. 508.

4. Complete protection of the rights and interests of the city was afforded through the presence of the appraiser of its selection during the examination of the books, and by the presence of the chairman selected by the two other appraisers.

It appears from the record that in whatever was done by the appraisers relative to the examination of the company's books, the appraiser selected by the city concurred and took part. Thus, the chairman of the board in his letter to the company asking that the books be brought to Cincinnati, expressed the desire of all the appraisers (Record, p. 156), and all the appraisers were together during the continuance of the appraisers' meeting in that city (Record, pp. 94, 95, 105).

From that time on, the books were exclusively in the custody of the board or the audit company, until returned to the water company, and during whatever examination the appraisers may have made of the books, the company was no more represented than was the city.

There is no evidence nor pretense in the case that there was any unfairness in the examination of the books, or in any use of their contents, or that anything was done in connection with their examination to the actual prejudice of the city.

POINT II.

The board of appraisers was not subject to the rules of procedure governing arbitrations.

1. In support of the contention that the procedure of the board of appraisers relative to the examination of the company's books was improper, counsel for the city are forced to disregard their own private conferences with the appraiser selected by the city, and to invoke the rules which courts have laid down with respect to arbitrations, and thus to rest their contention upon the barest technicality.

Counsel for the company concede that, in cases of arbitration, the general rule is that parties to the controversy must have notice of hearings before the arbitrators, and that the witnesses must be examined under oath, unless the taking of an oath be waived, and must be examined in the presence of the parties, who have the right to cross-examine.

Lutz v. Linthicum, 8 Peters 165;
People ex rel. Bliss v. Board of Supervisors, 15 N. Y. Supp. 748.

The reason for this rule is clearly that an arbitration, whether instituted by a submission at common law or under statutes, is a judicial proceeding, and that arbitrators constitute a judicial body, and therefore that their action under a submission involves a trial of the issues, and that their procedure becomes subject to rules analogous for the most part to those which govern other judicial proceedings.

Words and Phrases Judicially Defined, Vol. I, pp. 487 to 490.

An arbitration, however, pre-supposes a pre-existing controversy or difference, which is to be determined by the arbitrators through an award akin to the judgment of a court.

Garr v. Gomez, 9 Wend. 649, 651.

Yet even in cases of arbitration, the strict rules governing the trials and decisions of courts are not always applied.

Thus, in *Hall v. Norwalk Fire Insurance Co.*, 57 Conn. 105, it was held:

"Arbitrators are not forced to follow strict rules of law, unless it be a condition that they shall do so. (p. 117) * * * * *

Again, if, as is directly found in this case, persons are selected arbitrators by reason of special knowledge or skill possessed by them with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information, investigation and judgment, they may even be justified in refusing altogether to hear evidence (p. 117) * * * * *

The inquiry made by Mead, for his own information, as to the prices paid for labor in Wallingford, in the absence of the parties and of the other arbitrator, will not be sufficient to set aside the award, unless it appears (and it does not in this case) that the plaintiff was prejudiced or that the decision was affected thereby" (p. 117).

Cited with approval in *Continental Ins. Co. v. Garrett*, 125 Fed. 589, where the court said:

"If the character of the matter submitted and of the arbitrators chosen is such as to justify an inference that the appraisers were selected to act as experts, and adjudge the

matter from their own knowledge, it is not essential that notice shall be given or evidence heard unless the submission so provides" (p. 592).

2. The subject of the present review is not an arbitration but an appraisal; and the determination of the matter submitted to the board of appraisers is not an award, but an appraisalment.

There is a clear and vital distinction between the two cases. The distinction runs through the proceeding from beginning to end. It concerns the origin and nature of the proceeding, the official character of the persons who are chosen to determine the matter submitted, the rules governing their procedure and method of determination, and the quality and effect of their decision.

Thus, an appraisal is not due to a submission at common law or under a statute. It arises from an agreement, or a provision in the nature of an agreement. It does not presuppose an existing dispute or difference, but is a method agreed upon in advance for ascertaining, for the benefit of both parties, an incidental valuation necessary to the completion of a purchase or the consummation of some other engagement between them. The appraisers are not judicial officers, although their duties necessarily assume a semi-judicial character. They do not constitute a court and are not invested with the authority which pertains to arbitrators and referees. They have no power to compel the attendance of witnesses or to require witnesses to be sworn. Consequently they are not bound by the statements of those whose testimony is submitted to them. Whether or not they may care to listen to any evidence which the parties may choose to present, they

may entirely disregard such evidence. From the necessity of the case, they may seek information outside the testimony submitted, may make inquiries of others than the witnesses produced, may make investigations without the aid of the parties and without their presence, and may rely upon their own observations and judgment.

When their decision is reached and declared, it is not a determination in the nature of a judgment, nor an award for the enforcement of which a suit may be brought. Their report is simply the ascertainment of a price or valuation which, so soon as it is ascertained, fits into the original agreement or engagement with the same effect as if it had been inserted therein when the agreement or engagement was made. While an award, as such, is subject to enforcement or review by the courts, and may be set aside on merely technical grounds, the report of appraisers is not separately enforceable, but only as part of the agreement or engagement into which it fits, and cannot be reviewed as a judicial determination, and cannot be impeached, except upon clear proof of corruption, partiality or actual misconduct.

While, even in an arbitration, the strictest rules of procedure and adjudication are somewhat relaxed, in an appraisal they are, unless provision to the contrary be made by the parties, dispensed with altogether. Where no such provision has been made—certainly where a latitude of procedure is specifically assented to by the parties—the procedure and methods adopted by the board of appraisers cannot be subsequently questioned by either party, except upon grounds which involve actual fraud.

In the present case, there was no pre-existing matter of dispute or controversy between the

City of Omaha and the Omaha Water Company, when the appraisal was instituted. There was no offer by the city for the works of the water company, nor any demand of a price by the water company. Having the right, by the terms of the ordinance of 1880, to purchase the water works at the end of twenty years, the city, without preliminary negotiation, elected to exercise the right, and appointed an engineer as one of the appraisers by whom the price was to be determined. Upon that election an irrevocable contract of purchase was made. Upon the appointment by the water company of another engineer, as the second appraiser for the same purpose, and the selection of an engineer as the third appraiser, an appraisal was set on foot which neither party could recall, and from the result of which neither party could escape.

3. The vital distinction between an arbitration and an appraisal has been clearly and uniformly recognized from remote time by the courts.

Thus in *Leeds v. Burrows*, 12 East 1, decided in 1810, where there was an agreement between an outgoing and incoming tenant, that the latter should buy the hay of the former upon the farm, and that the former should allow the latter the expenses of certain repairs, the value of the hay and of the repairs to be settled by third persons, it was held, on appeal after the first trial, that the balance settled thus as due for the hay might be recovered upon a general *indebitatus assumpsit* for goods sold and delivered.

The plaintiff having recovered a verdict on the second trial, a motion for a nonsuit was made on the ground that the agreement was not within the

terms of the appraisement stamp act, but should bear an award stamp.

Lord Ellenborough, C. J., said that "it was only appointing persons to settle an account of what was due between the parties for the value of the different articles, and that the parties had no contemplation of submitting any differences to the award of arbitrators," and he therefore refused the rule (p. 6).

In the matter of *Lee v. Hemingway*, 3 Nev. & M., 860, Note to *Parkes v. Smith*, 15 Q. B. 305 (decided in 1834), the parties had agreed by deed that one should purchase from the other certain shares in a mine at a price to be ascertained by arbitrators, the conveyance to be made on payment of the money. Two awards having been made for different parts of the property, the seller tendered conveyances and demanded payment, which was refused. On application for an attachment against the purchaser, as for non-payment of awards under the Statute, 9 and 10 W. 3, C. 15, the attachment was refused, although the agreement had been made a rule of court.

The grounds of the refusal are fully stated in the opinion in *Collins v. Collins*, 26 Beav., 306, cited later.

In *Eads v. Williams*, 4 De Gex, MacNaghten & Gorden, 674, decided in 1854, a suit for specific performance, it was held that it was not a valid objection to the report with regard to the value of a mine, that the referees had refused to examine witnesses, or that one of the referees, instead of inspecting the mine, had acted on the report made to him by another person.

Collins v. Collins, 26 Beav., 306 (1858), was the case of a written contract between parties for sale

of a brewery and plant at a valuation by two valuers, who were to "choose an umpire before entering upon the valuation."

Upon failure of the two to agree upon an umpire, a summons was taken out, under the statute, for the appointment of an arbitrator by the judge. Provision for this was made by the statute "in any case of arbitration."

The application was denied, and the Master of the Rolls said:

"I do not think that in this particular case, the fixing of the price of the property is an arbitration in the proper sense of the term. An arbitration is the reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one that may arise is a material one, and one which may be properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them.

* * * * *

"Undoubtedly if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, 'We will refer this question of price to A. B., he shall settle it,' and thereupon they agree that the matter shall be settled by his arbitration, that would appear to be an 'arbitration,' in the proper sense of the term and within the meaning of the act: but if they agree to a price to be fixed

by another, that does not appear to me to be an arbitration.

"It appears to me that the case of *Leeds v. Burrows* (12 East 1) draws the proper and fit distinction between an *arbitration*, in the proper sense of the term, and an appraisal or valuation, for valuation undoubtedly precludes differences in the proper sense of the term; it prevents differences, and does not settle any which have arisen. The distinction seems to be drawn in the case of *Hemingway's Case*, cited in a note to the case of *Parkes v. Smith* (15 Q. B., 305). There was an agreement to sell land at a particular price to be fixed by award, and they came for an attachment under the award, and said it was an arbitration; but Mr. Justice *Littledale* very clearly pointed out the distinction; he says: 'This is not properly an arbitration, it is in effect an agreement to sell the land, and this is not the settlement of any difference between them, but merely something auxiliary to the contract entered into between them for the purpose of the sale of the land. Accordingly, upon a breach of the contract, you have your remedy, for it is clear, that a specific performance would have lain here in that case. It is clear also, that an action would have lain for damages, but not being an award, because it was not a matter in difference that was referred to these parties, you cannot have it by way of attachment.'

"Therein lies the distinction, and which is approved of by Lord Campbell, who thought it proper and one which he must adopt" (pp. 311-14).

In *Bottomley v. Ambler*, 32 L. T. N. S. 545 (1878), certain matters relating to a lease and the rent payable thereunder were referred to two arbitrators, and, in case they should differ, to an umpire. The arbitrators met without the presence of

the parties or their solicitors and discussed the matters referred, but without having any witnesses before them. As they could not agree, the matters referred were brought before the umpire, who only heard the statements of the arbitrators and then made his award.

The award was set aside by the Master of the Rolls, on the ground of irregularity, but on appeal was sustained.

THESIGER, L. J., said:

“In such a case as this the arbitrators are not arbitrators in the sense in which arbitrators are appointed in an ordinary case, where they are appointed to ascertain facts and to apply the law to the facts brought before them on evidence. No doubt an arbitrator ought not to make himself a partisan of one side. But in a mere case of valuation it is a thing much to be regretted that the usual course in such cases should be departed from. In such a case the arbitrators, being experts, may by means of their special knowledge and their acquaintance with the facts of the case as the agents of the parties, avoid the expensive machinery of an ordinary arbitration.”

James, L. J., added:

“I am of the same opinion. The subject-matter of the reference is essentially one of valuation and opinion. The arbitrators were the paid agents of the parties interested, and it would be absurd to suppose that they were intended to sit with all the pomp of judges” (p. 546).

The distinction is also stated in *Fry on Specific Performance*, Second Edition, as follows:

"Sec. 341. The persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute; valuers to ascertain the value of the subject-matter of the sale."

In this country the distinction was stated by Senator Seward, in 1832, in *Garr v. Gomez*, 9 Wend., 649, as follows:

"A distinction is justly made between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is conclusive of nothing as to the rights of the parties, except the mere appraisal or statement, and a submission of matters in controversy for the purpose of final determination.

This distinction is indirectly suggested in the case of *Elmendorf v. Harris*, 5 Wendell, 522, and is more plainly stated in a note under the same case by the reporter" (p. 661).

In *Garrard v. Macey*, 10 Mo., 161, decided in 1846, it was held that, where an agreement provided that in consideration of the giving possession of certain public land by one party to another, the latter should pay the value of the improvements, to be ascertained by five householders, the decision of the persons thus selected was not an award, upon which an action could be brought, but that the party in whose favor the decision was made could only recover on the agreement.

A similar ruling was made in *Curry v. Lackey*, 35 Mo., 389 (1858).

In *Kelly v. Crawford*, decided by this Court in 1866, 5 Wall., 785, where it had been referred by

agreement to an accountant to ascertain from the books of one of the parties the amount of indebtedness to the other, objections were made that in writing up the books, correcting errors discovered, and making entries of what had been omitted by oversight or mistake, the accountant had exceeded the submission, and that his report was therefore void.

These objections were overruled, and this Court said:

“The principal objections urged for a reversal of the judgment rest upon the idea that the agreement of September 13th, 1861, was a submission to arbitration, and the report or statement of Quigg was the award of an arbitrator; and that both are to be judged by the strict rules applicable to arbitrations and awards. This is, however, a mistaken view of the agreement and report. As observed by counsel, there was no dispute or controversy between the parties to be submitted to arbitration; nor was anything to be submitted to the judgment or discretion of Quigg. The books of account of the defendants were to determine the amount due; about these there was no controversy. The only duty of Quigg was to examine them as an accountant and to state what they exhibited” (p. 790).

Green & Coates Streets Pass. Ry. Co. v. Moore, 64 Pa., 79 (1870), was a case where a railway company accepted a charter on the condition that it should purchase, at the option of the owners, the horses, etc., of an omnibus line, at a price to be assessed by three appraisers, chosen pursuant to the charter, one by each party and the third by the two thus chosen. There was an appraisal concurred in by two of the appraisers, and

an appraisement for a considerably less amount by the third appraiser. Throughout the varied litigation which followed, the contention of the defendant that the appraisement was invalid because it was an appraisement by two only of the appraisers was invariably overruled. But the statute of limitations was held to be a bar to plaintiff's ultimate claim, on the ground that the appraisement was not an award, to be sued upon as such, but an appraisement which became a part of the contract, on which suit should have been brought.

The Court said, Sharswood, J., writing the opinion:

"An award is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained. Had the parties made the contract, and afterward, on a dispute arising, chosen arbitrators to determine what was due upon it, that might have been an award. *The case is entirely different where the parties originally agree to buy and sell at a sum to be fixed by an appraisement to be made by a third person or persons.* When the original contract is established by competent and sufficient evidence, then indeed the assessment thus made by authority of the parties . . . may be conclusive as to the price.

Nor is such an appraisement subject to the strict rules governing arbitrations and awards: *Kelly v. Crawford*, 5 Wall. (S. C.) 785. *It would not be necessary that the appraisers should decide upon evidence heard in the presence of the parties. They could decide, and indeed would be expected to fix the value of the articles, upon their own*

knowledge of the subject, though doubtless they might seek information from other quarters" (p. 91).

Palmer v. Clark, 106 Mass. 373 (1871) involved the construction of an agreement by which one of the parties was to pay the other, for filling in certain city lots with gravel, a sum proportionate to the amount of filling, as "measured on the ground by the city engineer." The measurements were first made by the city engineer's assistant, and were revised on the ground by the city engineer himself, and certified as correct. In an action to recover on the contract, the defendant alleged that the engineer's certificates were "so grossly inaccurate as to be fraudulent and void," and also alleged that the engineer could not revise a first certificate, and that his certificate could not be conclusive, because the measurements were not made by him or in his presence.

A judgment for the plaintiff was affirmed and the court said:

"A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive" (p. 389).

This decision is cited with full approval in *N. E. Trust Co. v. Abbott*, 162 Mass., 148 (1894).

Norton v. Gale, 95 Ill. 533 (1880) was a case where leases provided for rent to be paid yearly at six per cent. on the value of the premises, to be appraised by two property holders, who were to choose an umpire in case of their failure to agree. The two did agree on an appraisement made without notice to the parties and after refusal to hear appellants' witnesses on the question of value, and argument thereon by his counsel.

It was held that it was not a submission to arbitration, and that no notice to the parties was necessary before making the appraisement, where the lease did not so require, and that the finding of the appraisers would be conclusive upon the parties except for fraud.

The court said:

"The most serious objection urged against the judgment below is that the stipulation to refer the question of the value of the property to holders of real property in Chicago, as provided in the leases, is a submission of that question to arbitrators, and that the valuation made by Clark and Fuller is an award and not merely an appraisement; and, being an award, it is void, because made without notice to the parties to the submission—and after refusal to hear appellant's witnesses on the question of value, and argument thereon by his counsel, which evidence and argument, it is claimed, would have shown that the valuation, as made, is unjust to him. There was no evidence introduced, or offered, showing that the valuation, as made, was not the honest expression of the judgments of the

appraisers, and the only question in reality, is, was appellant entitled to notice and to be heard on the question of value? If he was not, there was nothing in the evidence introduced or offered showing objectionable conduct in the appraisers" (pp. 539, 540).

After discussion of authorities, the court goes on to say:

"There was, here, no matter in controversy when the leases were executed, or, for that matter, when the appraisers were selected, and the object was to preclude or prevent the arising of differences, and not to settle differences which had arisen" (p. 543).

Stose v. Heissler, 120 Ill., 433 (1887) was a similar case, where three persons were chosen in the usual way by the parties to a lease to fix future rent. It was held not to be a case of arbitration in the strict sense for the reason that "there was no difference or dispute between the parties to be settled." Citing *Norton v. Gale*, 95 Ill., 533, and, with reference to the provision in that case for an appraisal of property as a basis of rental by two appraisers, who, on failure to agree, might choose an umpire, the court said:

"The two appraisers did agree, but failed to give the parties notice of the time and place of meeting, which failure to give the parties an opportunity to be heard would have been fatal had the proceeding been an arbitration of matters in dispute" (p. 437).

In *James v. Schroeder*, 61 Mich., 28 (1886), where there was an agreement to leave the value of a pier to a person named and two other persons to be selected by him, all of whom were

spoken of in the agreement as "referees," the court held:

"This so-called reference was nothing more nor less than *an appraisal by appraisers* on their own inspection; and, in our opinion, there was no occasion for the presence of any one else. *It must be conclusively presumed that their judgment, if honest, was correct, and that it was honest if not shown to be otherwise.* The record shows nothing having a legal tendency to impeach it" (p. 32).

In *Noble v. Grandin*, 125 Mich., 383 (1900), the court passed on a contract by which the amount of the purchase price of certain timber lands was to be determined by the estimate of three appraisers. It was claimed that the contract was an agreement to submit to arbitration, and that the arbitrators had acted fraudulently in failing to estimate all the timber, that they made mistakes, that they did not correctly locate the different descriptions of land, and so on.

The court said (p. 390):

"There might, and undoubtedly would, be some force in these claims, if the contract can be construed as a submission to arbitration; but we are satisfied it cannot be so construed. Under this agreement the parties named therein were simply to estimate the merchantable pine timber on the land, and determine the amount, and make a report to the parties to the contract as soon as it could be correctly done. This, most certainly, is not a submission to arbitration. The theory of an arbitration is that it is a substitute for a proceeding in court. Such agreements can be revoked by either party, and notice of the time and place of meeting of the arbitrators

must be given the parties, so that they may have the opportunity to be heard. *There is a broad distinction between a submission to arbitration and the reference of a collateral or incidental matter of appraisement, measurement or calculation.*"

In *M. E. Church v. Seitz*, 74 Cal., 287 (1887), it was held:

"A provision in a contract for the purchase of property at a valuation to be determined by the appraisement of third parties is not an agreement for a submission to arbitration; and in making their valuation the valuers are not subject to the rules which govern arbitrations, and may make their decision without being sworn, and without giving notice to the parties affected, or according them an opportunity to be heard, unless such notice and hearing be required by express provision or reasonable implication" (Syllabus).

In *Guild v. Railroad Co.*, 57 Kansas, 70 (1896), suit was brought to compel specific performance of a contract for the purchase and sale of lands at a price to be fixed by appraisers to be selected by the parties. After the appraisers named in accordance with the provisions of the contract had proceeded to make their valuation, the defendant undertook to revoke the authority of the appraisers, who in the contract were denominated "arbitrators." The court held that neither party had any right to retreat from or annul their agreement.

The court said:

"A question is presented whether they were arbitrators, or merely appraisers selected to value the property, and if the latter, whether the defendant could still revoke

their authority before the appraisement was actually made. An arbitration is properly a submission to the decision of one or more persons of a matter in controversy or dispute between the parties. The only matter these persons were called upon to decide was the value of the land, which according to the evidence, had not been discussed by the parties" (p. 78).

"The authorities recognize a distinction between appraisers of value or persons selected to make a measurement or computation under such a contract, and arbitrators properly so called" (p. 79).

"It would seem to be settled, under the authorities, that where there is an agreement for the purchase and sale of lands or chattels to be appraised by third parties, and such agreement is upon a valid consideration, and where the appraisement is rather an incident of the contract than a single subject of agreement between the parties, one party may not retain an advantage gained by the contract and revoke the authority of the appraisers. The English cases go so far as to hold that a court will remove obstacles placed by the vendor in the way of the appraisers in performing their duties, as held in *Morse v. Merest*, 6 Madd. 27, and *Smith v. Peters*, (L. R.), 20 Eq. cases, 511" (pp. 80, 81).

Wurster v. Armfield, 175 N. Y., 256 (1903), was a case where appraisers had been appointed, under a contract, to determine the rental on which a lease should be renewed. It was held that they were not statutory arbitrators, and were not therefore required to take the statutory oath, or give notice of their meetings, nor required to follow the ordinary course of judicial procedure, nor bound by the ordinary rules of evidence.

The court said:

"The appraisers took no oath of office, gave no notice of their meetings, and did not avail themselves of the testimony of any witnesses sworn before them as to the value of the property. In brief, they did not comply with the provisions of Sections 2365, 2368 and 2369 of the Code. But we are of the opinion that the appraisal in this case was not a submission of a controversy to arbitration within the meaning of those provisions, but instead, it was an appraisal made under the provisions of the contract for the purpose of fixing the amount that should be paid by the tenant and included in his contract" (p. 264).

In *Norwich Gas & Electric Co. v. The City of Norwich*, 76 Conn. 565 (1904), it was expressly held that commissioners appointed to appraise the value of works, on a purchase by the city, did not constitute a court within the constitutional provisions of Connecticut, and that its members were not judges, although its "functions were quasi judicial" (p. 571).

Apparently, the only deviation from this firm line of authorities is the case of *Earle v. Johnson*, 81 Minn. 472, where the plaintiff, one of the appraisers selected under a lease to value real property for the purpose of determining the ground rent, brought an action for slander against the party appointing him, who had publicly charged that his appointee had been bought by the other side. The court said that, under the Minnesota statute which declares that "a person chosen arbitrator"—among other officials—"who makes any promise or agreement to give a verdict, judgment, report, award or decision for or against

any party * * * is guilty of a misdemeanor," the charge in question was slanderous.

The court also said:

"A person acting in the capacity of the plaintiff as an appraiser under a lease, which requires a valuation to be fixed upon real property, is to all intents and purposes an arbitrator at common law. The proceeding is, in effect, a common law arbitration." (p. 533).

It is submitted that this language, used under peculiar circumstances, is so much at variance with the overwhelming weight of the decisions already cited, that it may be wholly disregarded as an authority on the general question under discussion.

POINT III.

The three engineers were, from the outset, regarded by the counsel for both parties, as constituting a board of appraisers and not a board of arbitrators, and by agreement of both parties were given the widest latitude of procedure.

1. Thus at the first public meeting of the board, on July 20, 1903, Mr. Wright, then the City Attorney, and still one of the city's counsel, presented a written statement on the part of the city, in which its attitude with regard to procedure under the appraisal was stated as follows:

"As to the matter of the procedure to be adopted by your board, as to the method of arriving at the amount of property owned by the water company, and the determination of its value, the City of Omaha suggests that this board, having been appointed as experts in regard to the value of such property, ought to make a personal investigation as to the amount and extent of property of the water company, together with its condition, and determine therefrom its value. *As to the method of arriving at the amount and condition of the property of the water company, the City of Omaha suggests that this board may arrive at such facts by any method or means deemed advisable by it, but that, if the board shall determine to take proof and testimony before it, that it should go no further than to the question of the amount and condition of the property, and that said testimony should not be conclusive upon this board, but simply for its advice and information in the matter.* It is not the opinion of the City of Omaha that it would be proper or necessary to call expert witnesses as to the value, since the members of the board have been selected as experts, to whose judgment the question of value must be submitted upon the examination of the property" (Record, p. 144).

In his subsequent remarks at the same meeting, Mr. Wright said:

"I have quoted from the statement and have presented to you the section of the ordinance under which the franchise was granted to the water company, which provided that the City of Omaha might purchase the works, and this section contains the only statement as to the method of the appraisal; and our idea of the matter is that this board be selected from engineers as provided in this section; that

their duties are not those to hear as a court, but being selected from experts upon the line of the appraised value of the property, it is contemplated under this law that the board shall make an examination for themselves of all the facts. * * * *We do not believe it obligatory upon them to proceed in any particular way, because it is not an arbitration board appointed by the court, to whom they must report, but are selected under agreement.*" (Printed record of appraisement, Exhibit 7 Z, p. 5; Record, p. 142.)

In his printed brief, submitted to the appraisers, at the conclusion of the testimony of the witnesses called by the parties, Mr. Wright said:

"It is important to know that the appraisement was not to be made by any one appointed as a referee by a court, nor by a board of arbitrators, who should report their findings to a court for its approval; but that the estimate was to be made by men having expert knowledge of the subject of the construction of water works and its cost. * * *

"The contract in question contemplates that this board, from an examination of the works themselves, and from such evidence as it may obtain in regard to the same, *whether taken under oath or otherwise*, as this board in its discretion may deem proper, shall make its estimate of value. It is entirely appropriate for the board to learn from reliable sources as to the property and works of the company which are not open to view; and also to take such opinions as to the value of those classes of property with which, as engineers, they have no particular expert knowledge. We conceive it to be perfectly proper for this board to enlighten itself by whatever means it may deem trustworthy, both as to the extent of the works, and the necessity or value of such parts

of the works as may have a peculiar relation to this plant or may depend upon local conditions, such as the value of real estate, the cost of erecting the buildings, and the character of the river protection" (pp. 4, 5, 6). (See Record, p. 134.)

In this view of the character of the board and the scope of its duties and powers, counsel for the water company concurred, and in addressing the appraisers made this statement, which was embodied later in a printed brief:

"While assuming responsibilities which are closely akin to those of judicial duties, the appraisers do not constitute a court. They have no power to compel the attendance of witnesses, or the evidence of witnesses, or the production of books and papers. Whether or not witnesses are sworn before them is, in a sense, immaterial. They are not bound by the testimony of witnesses for the company, or for the city. They can, from their own experience, accept what they will and disregard what they will.. They can go outside of the oral testimony and outside of the printed record, or other record in the case, and seek for information where they choose. They can ask information from others, they may seek information from whatever source they deem useful for the purpose" (p. 24). See Record, p. 134.)

2. The board heard the explanation of the inventories submitted by the company, specially in description of features of the plant that were below ground and therefore not open to ordinary inspection. In compliance with the general custom where oral evidence is given, the witnesses were formally sworn, without objection from either

party. While the hearings were going on, the appraisers caused sections of the company's pipes to be taken from the streets, and made independent inspection of the company's works, the rip-rap on the Iowa shore, and the company's books, inspecting the property sometimes only with representatives of the city, and sometimes, it appears, by themselves alone (Record, pp. 148-155).

It is a mistake to say, as stated in the brief for the city, that with these hearings the case was closed. On the contrary, this statement was made by the chairman of the board on the last of these hearings:

"In closing this session of the board, which by common consent of the parties to this appraisal, is to be regarded as the last on which formal evidence is to be presented, and after receiving and listening to the able arguments of counsel, the matter of this appraisal has been formally handed to this board, the board wish to call the attention of the parties to this appraisal, to the fact that while much work had been already done, that the work of valuation of this board as a board has only just commenced. We have before us some thousand or more plats, diagrams, schedules, descriptive matter, some two thousand pages of evidence, and the arguments of counsel.

It becomes the duty of this board now to examine in detail these various schedules, to weigh the evidence presented, to examine the arguments which have been forwarded from this mass of matter, to arrange a schedule on which a valuation can be made by the board. It is undoubtedly evident to all who have followed closely these proceedings, that this will involve a considerable labor; *that undoubtedly much more information must be sought by the board than that already presented; and*

that the board will undoubtedly wish to call on the city and the company for special information as to details, the necessity for which will develop as the work proceeds.

In this connection I wish specially to call your attention to the fact that this is not a work of days or of weeks, but of months. While the board will undoubtedly take this matter up as expeditiously as possible, it must be recognized that the members of this board have other demands upon their time besides that of this appraisal, and I speak these words simply to make clear the fact that we recognize that no immediate report can be made, and that no such immediate report must be expected in this connection" (Record, pp. 147, 134).

3. The city and its representatives continued up to the day the report of the appraisers was delivered, to treat the proceeding as an appraisal and not an arbitration. Thus it appears from the record that the chairman of the water board was in continual communication with the appraiser selected by the city council, discussing the questions that were before the board, including values, and urged the appraiser to support the city's views, with no apparent thought of any necessity for the presence of representatives of the water company (Record, pp. 477, 481-3). It also appears from the evidence in the case, that other representatives of the city, including its counsel, were from time to time in the communication with the same appraiser in the absence of representatives of the company (Record, pp. 85-91, 153, 484).

Counsel for the city must have known, on the authority of cases cited in the city's brief, that such a course, proper in the case of an appraisal, might

be fatal to the whole proceeding, if that were an arbitration.

Moshier v. Shear, 102 Ill., 169.

Hewitt v. Village of Reed City, 124 Mich., 6.

So far from ever regarding the procedure of the appraisers as that of "a judicial body" as now claimed by counsel (Brief for City, p. 2), the city in its answer in the present case avers that "*they were without power or authority to swear witnesses or to take and receive evidence*", and characterizes their swearing witnesses as "a farce" (Record, p. 26).

It is noticeable that in the averments of the answer, charges are continually made against the two appraisers Benzenberg and Mead, in face of the undeniable fact that there was not a step taken nor anything done by the board except in the presence and with the participation and concurrence of the third appraiser, Alvord, up to the time of his dissent appended to the report at the last session of the board.

4. A careful examination of the numerous decisions cited by counsel for the city in support of the contention that it was improper for the appraisers to examine the company's books of accounts, except in presence of representatives of the city, shows that these decisions, except perhaps in a single instance, were made in cases of judicial arbitration, where the same strict rules were held to control the proceedings of the arbitrators and referees, which govern trials in the courts.

That possible exception, *Emery v. Owings*, 7 Gill, 405 (48 Am. Dec., 580), while the case of an appraisal of the cost of construction of a road, was treated as an arbitration (p. 497), and the award was held invalid on the ground that the arbitrators reached their conclusion solely through examination of the books of those who had built the road, without requiring or obtaining any further proof of the correctness of the charges, and without notice to the other parties, and in their absence. That was a case where the cost of the road had become really a matter of controversy and an issue to be tried by the arbitrators on evidence from both parties.

The cases of appraisals under insurance policies are in no essential respect parallel with the case under review. Those are virtually cases of arbitration of differences with respect to the value of property destroyed by fire, or damage to property in consequence of fire. With respect to such value or the loss and damage, evidence of the character of the property before it was destroyed or injured becomes essential to the appraisal. "Under such circumstances", as was said in *Continental Insurance Co. v. Garrett*, 125 Fed. 589 (p. 592), "appraisers should give notice to both parties of the time and place of hearing, and require evidence in respect of facts which they could not otherwise know."

In the present case, therefore, it cannot be held, either as matter of criticism upon principle, or as matter of defense under the proved facts and circumstances, that the position taken by the company and the procedure followed by the appraisers, and such use as the appraisers may have made

of the company's books, should invalidate or in any respect impair the appraisement.

POINT IV.

Having failed to raise the objection that the examination of the books without the presence of its counsel would imperil the report, until after the appraisement was completed, the city could not raise the objection then.

It was only for the purpose of attack upon the appraisement that the claim was made by the city that the procedure of the appraisers was subject to the technical rules respecting arbitrations, and that therefore their examination of the company's books was a fatal error.

In the "appraisement suit", numerous phases of the appraisal were set forth with regard to which it was averred that the appraisers were prone to error that would be fatal to a valid appraisement. Nearly every conceivable peril from the city's point of view was anxiously drawn to the attention of the court, with a full prayer for interference (Record, pp. 386-91). Yet no instruction of the appraisers was asked in the line of judicial procedure in the inspection of the company's books, which had already been publicly declared to be open to their confidential examination for the sole purpose of the appraisal. No complaint was made touching the proffer and restriction thus declared on the part of the company; nor was anything said on the subject.

When the books were examined in February, 1906, the appraisement suit was still pending, and testimony was being taken in it as late as April 17, 1906, when proof was given of the first examination of the books immediately after they were offered for that purpose (Record, p. 658). Yet counsel for the city took no steps toward bringing the subject to the attention of the court and asking for a settlement of the question.

It was held in *Drew v. Drew*, 33 Eng. Law & Eq. N., that even where, in a strict arbitration, a party is justified in withdrawing because witnesses have been examined in his absence, yet, "if he continues, after the fact comes to his knowledge, to attend subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground."

POINT V.

The appraisement cannot be set aside, or deprived of full effect as an ascertainment of the purchase price of the company's system of water works, except on positive proof of corruption, partiality or actual misconduct.

As was said in *Republic of Colombia v. Cauca Co.*, 106 Fed., 337:

"The presumption is in favor of the award, and to avoid it the party complaining must clearly show that the authority granted has been exceeded" (p. 349).

And as was further said by the court, with reference to the allowance under consideration in that case:

“What that allowance should be was left for the commission to determine. All of the members heard the evidence and the argument, and two of them agreed to the allowance. Before this court can interfere and declare their findings invalid, it must be shown by the evidence that they acted corruptly, or that they made a gross mistake, or the same must be apparent on the face of the award. * * * The utmost good faith in the discharge of their duties will be presumed and the result reached by them will not be disturbed without clear proof of either corruption, partiality, or misconduct” (p. 351).

Also, as was said in *Brush v. Fisher*, 17 Mich., 469:

“Courts, however, favor awards made by tribunals of the parties’ own choosing and are reluctant to set them aside, and every presumption will be made in favor of their fairness, and the burden of proof is upon the party seeking to set them aside, and the proof must be clear and strong” (p. 473).

While the answer of the city in the present case alleges, in different paragraphs, that the award was “so grossly excessive that the same was and is fraudulent and void” (p. 26), and that by reason of the alleged “grossly wrongful and irregular procedure” of the appraisers in the examination of the company’s books, “the said estimate of value is fraudulent and void” (p. 27), and that the appraisers “Mead and Benzenberg, in a large measure, in arriving at their estimate of the value

of the works of the Omaha Water Company relied upon and acted upon the report of the bookkeeper chosen by them without authority of the City of Omaha, and without the representatives of the said city having any opportunity to know what said report showed; and that by reason of the premises, said estimate, award and report of said appraisers is fraudulent and void" (p. 27), and that because said appraisers "adopted an arbitrary method which resulted in a large and excessive valuation, the said estimate and report is fraudulent and void" (p. 28),—no evidence whatever was even offered to sustain as matter of fact any of these allegations.

There is absolutely no proof in the case of any wrongdoing on the part of the concurring appraisers, or of any harm done to the city.

POINT VI.

The terms of the contract reserving to the City of Omaha the right to purchase the water works necessarily authorized a valuation by a majority of the Board of Appraisers.

1. The distinction between an appraisement in a matter of entirely private interest and an appraisement in a matter of public concern is obvious and conclusive.

Where the matter affects only those who are parties to the submission, the rule is well established that all the appraisers to whom the matter is sub-

mitted must unite for the purpose of a valid and binding determination, unless an express provision to the contrary be contained in the agreement of submission. In that case the parties are bound by the literal terms of the submission, and whether the submission results in a determination or a failure is wholly their private affair. Any failure of result leaves the parties still free to contract with regard to the subject matter of the appraisalment, or to resort to the courts for an adjudication, where there is a controversy.

Where, on the other hand, the appraisalment is a matter which concerns any considerable number of persons other than the immediate parties, interests are involved which failure of the appraisalment may irretrievably imperil. For then the persons whose interests are thus affected will not have such privity as will enable them either to institute or continue negotiations regarding the subject matter of the appraisalment, nor will they have any standing in court for the enforcement of a judicial determination of the controversy.

As was said by this Court in *Colombia v. Cauca Co.*, 190 U. S., 524, 528,

“In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand.”

No better illustration of this vital distinction can be found than in the case now before the Court. As stated in the city's petition for the writ of certiorari, the purchase by the City of Omaha of the system of water works of the Omaha Water Company in Omaha, South Omaha, East Omaha, Dundee and Florence involves “matters of great public interest and importance to the 175,000

people living in said cities and towns, and questions which to many of said citizens are of grave and serious concern" (Petition, p. 1).

It appears from the printed record that it was the belief of the chairman of the water board of the City of Omaha that nine-tenths of the people of that city wanted to buy the entire works (Record, p. 659).

Yet, if the appraisalment under review be held invalid for the want of concurrence of the three appraisers, none of these people, except members of the water board, *acting by a majority of their number*, will be in a position to put in motion a new appraisalment or negotiate with a view to the completion of the purchase the people desire, or have any standing in court to compel the water company to complete the sale of its water works to the city.

It seems a juggling with words for counsel for the City of Omaha to base their application to this Court for the writ of certiorari on the ground that the purchase of the water works is a matter of great public interest, and yet argue here that such purchase is not a matter of public concern.

2. It is, however, too clear for extended discussion that the acquisition by the City of Omaha of a system of water works is emphatically a matter of public concern.

It is equally so, whether the acquisition be considered an undertaking in the exercise of the strictly business powers of the city, or in the exercise of its municipal authority. On the business side it is a matter of concern to all the taxpayers by reason of their essential interest in the methods of providing for payment. On the other side it

is the intimate concern of all citizens, because of their interest in a water supply for domestic and mechanical uses and for the safeguarding of the public health and the protection of property from fire.

In this particular case, moreover, the purchase has been virtually commanded by an act of the legislature, which provided for the declaration by ordinance, that it was both necessary and expedient for the City of Omaha to construct or purchase a system of water works, authorized the creation of a water board to have charge of the operation of such system, enacted provisions for the protection of the water plant, provided for the levying of a water tax for the purpose of paying interest on any water bonds issued by the city in payment for the works, as well as the cost of operation, maintenance, extension and improvement of the plant, and declared that the act should be of full force and effect from and after its passage and approval, by reason of an existing emergency.

Act of 1903, Sections 1, 3, 4, 5, 6, 10, 12, 14, 18 and 22 (Appendix to this Brief).

The public character of the acquisition of the water works system in question is equally and specifically recognized by the Act of 1905 (Appendix to this Brief).

Apart from these express statutory provisions, it must be held that the acquisition of this system of water works, under the option reserved by the ordinance of 1880, is necessarily a matter of public concern.

As said in *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, "that the supply of water to a city is a public purpose cannot be doubted" (p. 689).

In *Wagner v. City of Rockland*, 146 Ill, 139, the court held:

"The business of furnishing the inhabitants of a city with water by means of water works so constructed as to bring the water from some permanent source of supply and distribute it by means of pipes laid in the streets to the residences and places of business of those desiring to obtain their water supply in that manner, though not an exercise of the power of sovereignty, is undoubtedly a business which is public in its nature, and belongs to that class of occupations upon which a public interest is impressed" (pp. 153-154).

Directly relevant is the decision in *Minneapolis Mill Co. v. Board of Water Commissioners of St. Paul*, 56 Minn. 485..

In that case the legislature of Minnesota had authorized the City of St. Paul to purchase the water works of a private corporation theretofore engaged in supplying the city with water. A board of water commissioners was created by the same act and, as a branch of the city government, took charge of the water works after their purchase. The plaintiff, owner of mill rights on the Mississippi River, sought to enjoin this board from taking water for the city from a lake which fed a stream flowing into the Mississippi above the location of the plaintiff's dams. The orders dismissing the complaint were affirmed.

The court, in the course of the opinion, said:

"The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use

of cities in their vicinity is such a public use and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the city, through boards of commissioners, or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city water works, does not affect the real character of the use, or deprive it of its public nature" (p. 490).

See also:

Winters v. City of Duluth, 84 N. W. 788, 82 Minn. 127;
Eau Clair Water Co. v. City of Eau Clair, 132 Wis. 411.

That this is necessarily so follows from ancient decisions, applied within our time beyond what is necessary in the present case. It was said by Lord Chief Justice Hale, more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg., Law Tracts, 78, that when private property is "affected with a public interest, it ceases to be *juris privati* only."

As declared by this Court in *Munn v. Illinois*, 94 U. S., 113, "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large" (p. 126).

See also

Budd v. New York, 143 U. S. 517;
Slingerland v. Newark, 54 N. J. L.,
 62;
*Kennebec Water District v. Water-
 ville*, 96 Me., 234.

3. Public policy therefore requires that in a matter of public concern the determination of a majority of the appraisers, where all meet to consider the matter, must be taken as the act of the whole. This rule is quite as firmly settled as the contrary rule with regard to appraisements in merely private matters, and was laid down long ago in *Grindley v. Barker*, 1 Bos. & Pul. 229, when Eyre, Ch. J. said:

“I think it is now pretty well established, that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.”

The rule is plainly stated in *McCoy v. Curtice*, 9 Wend. 17, as follows:

“Where power is delegated to two or more individuals for a mere private purpose, in no respect affecting the public, it is necessary that all should join in the execution of it. Thus arbitrators must all unite in an award. But in matters of public concern, if all are present, a majority can act, and their acts will be the acts of the whole” (p. 19).

This language is adopted in *Cowan v. Murch*, 97 Tenn., 590, 598, and *Carroll v. Alsup*, 107 Tenn., 257, 271.

Directly in point is the case of *People ex rel Washington v. Nichols*, 52 N. Y. 478.

In that case the price to be paid by the State of New York for certain relics of George Washington was "to be paid only upon the certificate of Martin Grover and the Chancellor of the University and J. Carson Brevoort, that the said relics are, in their opinion, genuine; and that it is desirable, in their judgment, that they should be placed in the Museum of the State Library."

Two of the three persons named certified that the relics thus referred to were, in their opinion, genuine, and that it was desirable, in their judgment, that they should be placed in the Museum of the State Library; stating however, that they thus certified "without the concurrence of their associate."

The validity of the certificate was upheld by the court, which said:

"By the well settled rule at common law, this power would have been legally exercised by the signature of two of the three to the certificate when all three had assembled to pass upon the question" (p. 481).

Citing *Green v. Miller*, 6 J. R., 39 and *Ex parte Rogers*, 7 Cow., 526, 529, the court further observed:

"In the case at bar the legislature desired to purchase, upon certain terms, what they regarded as of interest and value to the public. It was a question between an individual and the State. This would seem, then, to be plainly a matter of public concern. This certificate, therefore would have been legally given at common law when signed by a majority" (p. 482).

Young v. Buckingham, 5 Ohio 485, was a case of appraisement under a statute providing for the erection of a toll bridge, and the acquisition of land for the purpose, to be valued by three commissioners. An appraisement by two of the three was upheld, and the Court said:

“The statute requires that the land shall be valued by three freeholders and the assessment paid, before it can be taken for the bridge. The proceedings of the court show the valuation made and the amount tendered, but that, although all the appraisers were present and acting, two only united in the appraisement. It is objected that the dissent of one invalidates the appraisal, for it is insisted that a strict execution of powers must be shown.

The determination of this point depends upon the nature of the powers to be executed by the commissioners. In the execution of a power delegated for purposes merely private, it is necessary that all should concur in the act, as in the case of trustees, arbitrators, etc. But if the persons be entrusted with powers *in some respects of a general nature, or for public objects*, if all are acting, a majority will conclude the minority and their act is the act of the whole. Co. Lit., 181; 1 B. and P., 228; 6 Johns., R., 39. It is evident that this power was confided to these commissioners for public objects, since the taking of the land from McIntyre can be justified upon no other ground than that it was demanded by public interest” (p. 489).

Colombia v. Cauca Co., 190 U. S., 524, is a decision clearly applicable to the case now before this Court.

Growing out of a controversy between the Republic of Colombia and the Cauca Company, which

had partly built a railroad of which that government claimed a forfeiture, an agreement was made, the essential features of which were that the company surrendered the railroad and that Colombia agreed to pay a just indemnity to be determined by a commission of three—one appointed on behalf of Colombia, one on behalf of the company, and the third by agreement between the Secretary of State of the United States and the Colombian Minister at Washington. The commission was, by the terms of the agreement, authorized to "determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties." In pursuance of this power, it resolved that all decisions should be by a majority vote.

After all the testimony had been taken, and all the matters in controversy had been argued by the parties and considered by the commission, and a final vote thereon was about to be taken, and after a number of the items of the award had been agreed upon, some unanimously and some by a majority vote, the member of the commission appointed by the Colombian government wrote a letter to his government resigning his position, delivered a copy of such letter to his colleagues and refused to take any further part in the proceedings. Thereupon, an award was made on the same day by the concurring votes of the other members.

The Republic of Colombia brought a suit in equity for a cancellation of the award, on the ground that it had been concurred in by only two of the three arbitrators. The defendant interposed a cross bill to establish the award as valid,

notwithstanding the withdrawal of the representative named by the plaintiff. The decree of the Circuit Court confirmed the award, after rejecting certain items (106 Fed. R., 337). This decree was affirmed by the Circuit Court of Appeals on the opinion below (113 Fed. R., 1020), and this decree of affirmance was sustained by this Court.

This Court said:

“The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as a result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign state and a railroad, declared by a law of Colombia to be a work of public utility. *In short, it was dealing with matters of public concern.* It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. *Obviously that was the only way, as each party appointed a representative of its side.* We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed” (p. 528).

Gas Co. v. Wheeling, 8 W. Va., 320, was a case precisely parallel to the case that is now before the Court, except that there, upon failure of the parties to agree upon a price, there was an arbitration of the difference, and that there it was the company, not the city, which contended that the appraisement was invalid for want of concurrence by all three appraisers.

It was provided in the act of the General Assembly of Virginia, incorporating the Wheeling Gas Company, that, upon the expiration of twenty years from the time of the grant to the company of the privilege of using the streets, alleys and public ground of the city of Wheeling, for the purpose of lighting the city with gas for the term of thirty years, the city should have the right, at the discretion of the city council, to purchase the works of the company at a price to be agreed upon between the city council and the directors of the company, "or to be fixed, ascertained and determined in the following manner: By the award, in writing, of three persons to be chosen, the first by the directors of said company, the second by the council of said city, and the third by the two thus chosen." It was further provided that the appraisers, in making up their award and ascertaining the value of the property, should not consider the value of the franchises of the charter, or the dividends or profits arising to the stockholders.

Upon the expiration of the twenty years, the city gave notice of its intention to purchase, and, upon a failure of the parties to agree upon the price, three persons were chosen, according to the act, to fix, ascertain and determine the price.

These three persons jointly heard, received and considered the allegations made and the evidence produced before them touching the matters submitted, and at length two of them made their written award, in which, after reciting the preliminary proceedings, they go on to say:

"Having heard, examined and duly considered the allegations, vouchers and proofs and witnesses of the said parties respectively (B. M. Eoff being at all times present dur-

ing all examinations and deliberations and also present at the making of this our award), we, the said John McLure and Robert B. Woods do make and publish this our award in writing of and concerning the matters referred to or devolving upon us by the provisions of the seventeenth section of the Act of the General Assembly of Virginia, entitled 'An Act to incorporate the Wheeling Gas Company,' passed March 18, 1850, as follows, that is to say: With respect to the present actual value in money of the lots or grounds, works, apparatus, fixtures, and property of said gas company: We, the said John McLure and Robt B. Woods, do award, adjudge and ascertain the value to be the sum of seventy-three thousand and six hundred and thirty-seven dollars and fifty cents (\$73,637.50). And with respect to the price and the terms upon which the said city of Wheeling shall become the purchaser of the lots or grounds, works, apparatus, fixtures and property of the said Wheeling Gas Company, we, the said Jno. McLure and Robt. B. Woods, do award, fix and ascertain and determine that the said City of Wheeling shall become the purchaser of the said lots or grounds, works, apparatus, fixtures and property of the said Wheeling Gas Company, upon its paying or causing to be paid to the said Gas Company, on or before the 30th day of June, 1871, the sum of \$73,637.50. In witness whereof we have hereto set our hands, this the 29th day of May, 1871.

ROBT. B. WOODS,
JNO. McLURE."

Below appeared: "I dissent from the above.
May 29, 1871, B. M. Eoff."

The City of Wheeling, by its gas commissioners, previously authorized, thereafter tendered the specified price to the officers of the gas com-

pany, who refused to receive the same. The city, then, by its commissioners, deposited the money in the bank, subject to the order of the company, and took possession of the company's works.

Some time after, the company brought an action of ejectment against the city to recover the property. After a demurrer by the city had been overruled, the cause was tried before a jury, and the jury found for the defendant, and a judgment was rendered accordingly, which, on appeal to the Supreme Court of Appeals of West Virginia, heard by three judges, was sustained, in accordance with their unanimous opinion.

The chief contention on the part of the company was, that the instrument of writing, dated May 29, 1871, purporting to be an award, was not valid and binding, because it was the award of only two of three appraisers.

The court held that, from the provisions and manifest objects of the legislative act under which the company was incorporated, it was the intention that the city council should have the absolute right to purchase the property of the company, and that, in the event the council should elect to make the purchase and should fail to agree with the directors of the company on the price, the price *should* be fixed, ascertained and determined *at all events* by an award of the appraisers, and that the remedy given by appraisal *should* be complete, effective and reasonably expeditious. Consequently it was held not to be essential to the validity of the award that more than a majority of the appraisers should agree to and sign the same, where all acted jointly, but that the price should be determined by this appraisal, and that the purchase and possession of

the property by the city should be complete upon its complying with the terms of the appraisal so made.

In passing upon this branch of the case the court said:

“It would be a discreditable reflection upon the wisdom and foresight of the legislature to suppose that it had given the council of the city an absolute right to purchase the gas works, property, etc., in their discretion, at their reasonable value, excluding the value of the franchise of the charter and the dividends or profits accruing to the stockholders, and had provided specifically but two modes or remedies by which the price and terms of the purchase were to be fixed, ascertained and determined, neither of which was reasonably certain, *and either of which could easily be defeated by the act of the plaintiff*” (p. 358).

“When we consider the object and purpose of the legislature, as well as its importance, in authorizing an absolute right of purchase of plaintiff's gas works and property, as provided in said seventeenth section, it seems to me to so construe that section as to require all three of the arbitrators to sign the award fixing the price and terms of purchase, to make it valid, would be absurd and unreasonable, and would defeat the object of the section. For these reasons, I consider and am of the opinion that said instrument of writing, bearing date the 29th day of May, 1871, purporting to be an award, is within the provisions of the said seventeenth section of the Act of the General Assembly of Virginia, incorporating the plaintiff, and that it is a valid award” (pp. 359-360).

The reasoning here applied with respect to a provision for purchase in a legislative act cer-

tainly applies with equal force to the construction of the purchase clause of the Omaha ordinance of 1880, itself a legislative act.

See *St. Paul Gas Light Co. v. St. Paul*, 181 U. S., 142.

While the West Virginia court was content to rest its decision strictly upon the grounds already stated, it also discussed the question of the validity of the appraisement concurred in by two of the three appraisers, in respect to the purchase as a matter of public concern.

At the time that decision was rendered, the law of *quasi* public corporations had not been developed to the extent to which it has since been established by repeated decisions of the courts, which make it clear that the acquisition by municipal corporations of gas works and water works is nothing less than a matter of public concern.

As the law on this subject now stands, as declared by the authorities already cited, the reasoning of the West Virginia court, and the authorities cited by that court, are not only directly applicable, but absolutely conclusive in the present case.

In the course of a lengthy opinion the court said:

"In the case of *Eames v. Eames*, 41 N. Hamp. 177, Fowler, Judge, in delivering the opinion of the court, says, on page 181: 'It is well settled that when a submission, by parol or in writing, is made by private parties to a given number of persons, without any express authority, given or to be inferred from the manner or circumstances of the submission, that a smaller number may decide, an award or decision will be

void unless made by all; *though a different rule prevails where authority is confided to several persons in matters of public concern.*' A part of the syllabus of the case is in the language of the Judge, see page 177. In the case of *Green v. Miller*, 6 Johns. (N. Y.), 39, the syllabus is 'where an authority is confided to several persons for a private purpose, all must join in the act; *aliter in matters of public concern.*' And Judge Thompson, in delivering the opinion of the court, in the case from which the syllabus is taken, says: 'I am, however, satisfied that as a submission to arbitration is a delegation for a mere private purpose, it is necessary that all the arbitrators should concur, unless it is otherwise provided by the parties. *In matters of public concern a different rule seems to prevail.*'

"In the case of *Patterson v. Leavitt*, 4 Conn., 50, the Chief Justice in delivering the opinion of the court, says: '*If a power be of a public nature, the majority may perform the act delegated, the power being considered joint and several*' " (pp. 352, 3).

The legislature, in authorising the purchase, evidently contemplated that the city would use said gas works, etc., in the manufacture and furnishing gas for the consumption of the inhabitants, and for lighting the public buildings, streets, alleys and public grounds within the city for the benefit of the inhabitants thereof—in other words, the public—and *that the money with which the purchase should be made should be raised or paid, ultimately, by taxes, imposed by the city on the corporations thereof.* The authority to purchase was evidently given for the benefit of the municipality in the course of its municipal business or duties. In other words, the city was acting in its capacity as agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of

Wheeling. * * * It seems to me, all things considered, that in some respects the purchase of the said gas works, etc., was authorized for a public purpose, and that the public interest was and is concerned to some material extent therein and in the making of said award. * * * *Under the views I have advanced the public has some interest, and was and is concerned, to some extent, in said purchase and award, and if that is correct, then, according to some of the authorities I have cited, the award agreed to and signed in this case by two of the arbitrators is valid, although the third arbitrator dissented*" (pp. 355-6).

4. Both on the ground upon which the decision in the West Virginia case was based and the ground set forth with such logical conclusiveness, the appraisement in the present case must be sustained.

Here, as there, it was unquestionably the purpose of the ordinance of 1880 that, in the event of a forfeiture of the water works, under Section 11, or a purchase under Section 14, the city should, beyond peradventure, "become vested with the ownership, possession, control and management of said water works and property appurtenant thereto, or connected therewith" (Record, p. 685).

The acquisition of such property, whether through forfeiture or purchase, was made subject to the payment of a just compensation therefor, to be ascertained by an appraisement, as provided in section 14, of the ordinance.

It could not have been within the contemplation of the city council that a forfeiture or purchase could be defeated by either the withdrawal or non-

concurrence of the engineer appointed by the water works company. Nor could it have been within the contemplation of Locke that an ordinance of purchase, duly adopted by the city council and approved by the mayor, could be virtually repealed by the withdrawal or non-concurrence of the engineer selected by the city council.

When the act of 1903 made it the duty of the mayor and council to declare by ordinance that it was necessary and expedient for the city to construct or purchase, as the case might be, a system of water works, and, in case of a purchase, to take the necessary steps to acquire such water plant, either under the powers granted by the charter of the city, or by virtue of any rights enuring to the city through contract, it must have been the intent of the legislature to provide for resort to a sure method of acquisition.

In choosing to acquire the system of water works operated by the Omaha Water Company by virtue of the right reserved in the ordinance of 1880, instead of resorting to condemnation proceedings, the mayor and the council committed the city irrevocably to a purchase under the terms of the ordinance, subject only to the ascertainment of the price by an appraisement.

It is inconceivable that such a contract of purchase can be rendered nugatory by the mere withdrawal or non-concurrence of the appraiser appointed by either party. Such a possibility would involve the incidental delegation to each of these appraisers of a power greater than the party appointing such appraiser could wield, and a power sufficient to defeat the will of both of the contracting parties.

The circumstances of this case not only show that such a result could not have been within the contemplation of the parties, but also demonstrate the reason of the established rule that, in matters of public concern, the determination of a majority of a board of appraisers must prevail.

5. If the contrary were to be held in a case like this, then the city might, through the withdrawal or non-concurrence of its engineer at the end of the case, ascertain the extent and value of the company's property, and then avail itself of choice between completing or refusing to complete a purchase.

This would be an obvious avoidance of the clear intention and logical consequence of an exercise of the option provided for in section 14 of Ordinance 423. But if this end could not lawfully be reached by direct means, it obviously could not be accomplished indirectly.

The right of a city to do this was tested in *Montgomery Gas Light Co. v. The City Council of Montgomery*, 87 Ala., 245.

The contract there was similar to the Omaha contract and contained a stipulation that, at the expiration of twenty-five years from November 1, 1852, the city should have the right to buy the gas plant "at such price as may be ascertained and determined by five disinterested men, two of whom shall be chosen by the city council of Montgomery, two by said John Jeffrey & Co. * * and the fifth by the four thus chosen."

At the end of the twenty-five years, the city council, seeking to avail itself of this option and "with a view to purchasing" the gas plant, appointed two men to act as appraisers and notified the company to appoint two others. The com-

pany refused to appoint, on the ground that the city, while it had the right to purchase the property, did not have the right to an appraisal merely with a view to purchase. Thereupon the city gave the company notice that the contract was at an end, and proceeded to arrange a contract with another company, to prevent which suit was brought.

The Supreme Court of Alabama held that the city had no right to a tentative appraisalment; that the city's construction of the contract would have compelled the company to sell its property at the assessment of the appraisers, whereas the city would not have been compelled to buy it on that basis against its will; and that such a construction would produce an unequal status of parties, which could not have been contemplated by the contract.

The court said that the city could have made a preliminary investigation on its own account without expense to the company, before having any appraisers appointed under the contract, and need not have called for the formal appraisal without a fairly accurate knowledge of what the city would eventually be bound to pay for the plant.

The court also said:

"The offer implied that the seller took the chances of a fair valuation by appraisers. The acceptance to be responsive must assume the same uncertainty on the part of the purchaser. To accept upon the condition that the appraisers shall first determine upon a price the acceptor is willing to pay, is manifestly not only no acceptance at all, but is an affirmative rejection of the offer" (p. 255).

6. All the conditions of a valid appraisement through the concurrence of two of the three appraisers are shown by the evidence to exist in this case.

Mr. Alvord, the engineer selected by the city, joined with Mr. Benzenberg, the engineer selected by the company, in the selection of Mr. Mead as the third engineer, to complete the number of appraisers (Record, pp. 161-2).

Mr. Alvord was present and acted with the other appraisers at the first meeting of the board of appraisers, when it organized with the appointment of Mr. Mead as chairman and Mr. Alvord as secretary (Record, p. 161).

Mr. Alvord sat with the appraisers at the City Hall in Omaha at all the sessions during which the inventory, in the form of maps and plans, with explanations, was submitted to the board, and heard the statements made on behalf of the company and on behalf of the city (Record, pp. 133, 142-3).

Mr. Alvord joined with the other appraisers in selecting localities for the removal of sections of the company's pipe-line system, for the purpose of determining the character and extent of depreciation of the pipe (Record, p. 145).

Mr. Alvord, with the other appraisers, visited the company's works and property in Omaha and at Florence, South Omaha and elsewhere, and inspected the river protection on the Iowa bank, as well as at Florence (Record, pp. 144-147).

Mr. Alvord had every opportunity which the other appraisers had of examining the company's property and books and considering the elements of valuation, and, as matter of fact, availed him-

self, equally with the other appraisers, of all these opportunities (Record, pp. 95 658).

It can not be denied that Mr. Alvord was present with the other appraisers at every meeting of the appraisers, wherever held (Record, p. 133).

Mr. Alvord was not only present with the other appraisers at the last meeting of the appraisers, when the report was agreed upon and signed, but at the same time appended his non-concurrence at the end of that report (Record, p. 165).

The conclusion then reached was arrived at after months of investigation, involving an expense to the city of large sums of money and an expense to the company of vastly larger sums—about \$27,000., besides legal expenses—in the preparation and submission of the case (Record, p. 130).

The work of all the appraisers continued after the matter had been argued at length before all the appraisers by counsel of both parties; also after the court on application of the city had given the appraisers all the instruction deemed advisable on a submission of all the questions claimed by the city to be involved in the appraisement.

As in the West Virginia case, there was a mere declaration of non-concurrence in the report and in the valuations reported.

It must be assumed that Mr. Alvord, as an engineer of reputation in his profession, undertook to render to the city, for the compensation paid him from the city treasury, honest and valuable service in the appraisal of the true valuation of the system of water works operated by the Omaha Water Company. Both the city

and the company were entitled, under the terms of his employment, to have the benefit of his services in making the appraisal. It cannot be that the terms of his employment were satisfied, or that the service due the city was fulfilled, by his merely attempting to block and defeat the appraisal at the finish. It cannot be held that he acted fairly either to the city or to the company in a mere non-concurrence with the other appraisers, without specification of his own estimate, or of the difference between the other appraisers and himself. Having acted with the other appraisers throughout, he must, therefore, be presumed to have taken part in their deliberations, as well as their examinations, and to have given them the benefit of his experience, views and judgment, and to have made with them actual estimates of the value of the properties, which in gross and in detail the appraisers were required, by the terms of their appointment and under the instruction of the court, to estimate.

The failure of Mr. Alvord to state, and the failure of the city to prove, what the difference was between the valuation of the other appraisers and his valuation, necessarily leave their estimate unaffected by his non-concurrence. The conclusion is inevitable that the difference between them was comparatively slight, or it certainly would have been either expressed by Mr. Alvord, or proved in this case by the city.

There is no evidence in the case upon which the courts below could have found that the estimate ascertained and reported by the two appraisers was not virtually Mr. Alvord's estimate as well; or could have found that there was any material

difference between the two estimates, or could have found in the estimate stated in the report any infirmity of valuation as matter of fact, or invalidity of appraisal as matter of law, by reason of Mr. Alvord's non-concurrence.

In view of the course of the appraisement as disclosed by the evidence, and of Mr. Alvord's action throughout the appraisement, and his attitude at the last, the language of the judge at Circuit, in the opinion in *Republic of Colombia v. Cauca Co.* (106 Fed., 337), adopted by the Circuit Court of Appeals (113 Fed., 1020), may be applied, in large measure at least, in the present case.

The court there said:

"Clearly, it was not the intention of the parties to the convention that the existence of the commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. *It would be an impeachment of the common honesty of the parties to the agreement, and a travesty of their evidently honorable intentions, to hold that they designed it should thus be in the power of one man to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research.*"

7. There is no warrant in the case for the statement by counsel for the city that the contract of purchase "by the interpretation put upon it by everybody connected with this transaction, contemplated that the valuation should be ascertained by the joint concurrence of the three appraisers, and all parties acted on that theory until the moment when it was finally determined that the three appraisers could not agree" (Brief, p. 9), or the statement that "the appraisers, from the begin-

ning of their proceedings, July 20, 1903, as well as the representatives of the respective parties, acted upon the theory that it would be necessary for the three appraisers to agree upon the valuation to be fixed upon the water works" (Brief, p. 21).

No one questions that it was the duty of all three appraisers to meet together and to "confer and act together." That is what they were selected to do, and were paid for doing. But it no more follows that they were bound to unite in their estimate than that unanimity is essential to a determination by any other board charged with duties of public moment.

Diametrically opposed to the statements of counsel for the city is the view of the facts taken by the Circuit Court of Appeals:

"It is not improper to observe that until the report was made the three appraisers were regarded by all parties as composing a board or body invested with powers in their aggregate capacity. Immediately upon their selection they organized as a 'Board of Appraisers' by the election of one of their number as chairman and another as secretary, and thereafter they constantly referred to themselves as a board. They were so addressed by counsel for the city when he outlined a method of procedure for their adoption. While the appraisal was in progress, the water board and the city filed a bill in the Circuit Court against the appraisers and the company to secure authoritative directions as to the appraisal. In this bill of complainants, in the answer of the company and in the decretal order of the court, there is constant reference to them as 'the board' and the 'board of appraisers.' The popular conception of a board is that, like tribunals in general, it acts as a

unit and speaks through a majority of its members."

Omaha Water Co. v. City of Omaha,
162 Fed. 225, pp. 229, 230.

This view of the facts is amply supported by the evidence in the case. (Record, pp. 143, 144, 147, 157, 159, 161, 162-165, 170, 185, 186, 370-391, 405-417, 502).

8. None of the decisions cited by counsel for the city in support of the contention that the report was void because not concurred in by the three appraisers, is in conflict with the undeviating line of authority that unanimity in final determination is not necessary in matters of public concern. Not only is there no decision presented to the contrary, but in many of the cases cited the distinction is expressly recognized and stated.

See *Patterson v. Leavitt*, 4 Conn.
50;

Harryman v. Harryman, 43 Md. 140;

Lowe v. Brown, 22 Ohio St. 463;

Hubbard v. Great Falls Mfg. Co., 80
Me. 89;

Weaver v. Powell, 148 Pa. St. 372;

Cortis v. Kent Water Works Co., 7
B. C. 314.

9. There is no inconsistency as regards this question in the decisions of the Circuit Court of Appeals in the earlier case of *Omaha Water Company v. City of Omaha*, 147 Fed., 1, and in the present case of the *Omaha Water Company v. City of Omaha*, 162 Fed. 225. While it is true that that court in the earlier case held that "in contracting

for the construction or purchase of water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative, but is using its business or proprietary powers," it did not hold in that case that the ordinance containing such a contract was a matter of private contract as distinct from one of public concern. Nor did that court hold in the present case that such a contract "is a public contract and of a public nature as distinct from a contract between individuals or private corporations" (Brief on Petition for Certiorari, p. 14), but the court did say that "It has never been held, and never can be with reason, that a contract between a water company and a city for the acquisition by the latter of a system of water works, is not a matter of public concern" (162 Fed., p. 231).

10. Nowhere has it been held that, in order to sustain an appraisalment by a majority of a board of appraisers or any other board in a matter of public concern, it is necessary that the members of such board be public officers, or invested with authority through national or international arrangement, or be clothed with authority by statute.

While it is true that in the present case the ordinance of 1880, providing for the appraisalment, was virtually a legislative act, under delegated authority, as has been repeatedly held where impairment of a contract has resulted from the terms of a city ordinance (181 U. S. 142), neither such character of the ordinance, nor the public purpose for which the purchase provided for was to be made, was essential to the application of the majority rule. Because of the underlying reason of the rule, it was sufficient that the

purchase in question be merely a "matter of public concern," or, as said in *Grindley v. Barker*, 1 Bos. & Pul. 229, be "in some respects of a general nature"; unanimity being required only, as held in *McCoy v. Curtice*, 9 Wend. 17, "where power is delegated to two or more individuals for a mere private purpose in no respect affecting the public."

By no means all of the cases in which the majority rule has been applied were of governmental character. Thus, in *Crooker v. Crane*, 21 Wend., 211, the board which the court held could act by a majority was a board of commissioners to receive subscriptions to the capital stock of a railroad company. The incorporation of the company by a special act of the legislature gave it no higher character than if it had been incorporated under a general law. It was not a governmental agency for any purpose, but the public had an interest in the proper allotment and distribution of its capital stock.

Neither in that case nor in the *Wheeling Gas Case* was there determined "a matter arising only under a *public law*," in the sense claimed for it by counsel for the city (Brief, p. 23), although the Supreme Court of West Virginia has held, in conflict with the Supreme Court of North Carolina and the Court of Errors and Appeals of New Jersey, that an act incorporating a private corporation is a public act.

State v. B. & O. R. R., 15 W. Va., 392 (1879).

Durham v. Railroad, 108 N. C., 399 (1891).

Perdicaris v. Trenton City Bridge Co., 29 N. J. L. 367 (1862).

11. It follows that where a city has, by exercise of such a reserved right as that contained in Section 14 of Ordinance No. 423, become bound by an irrevocable contract of purchase, the right of either party to a completion of the purchase cannot be either defeated or impaired through the action of a single appraiser, any more than by the action of one of the parties to the contract.

Therefore, upon all grounds, the estimate stated in the report, signed by two of the three engineers constituting the board of appraisers, must, as matter of law, following the language of the court in *Grindley v. Barker*, be considered as "the act of the whole."

POINT VII.

The going value of the company's system of water works, as distinguished from the unexpired franchise, is an integral and essential element of the appraised valuation of the property.

While the inclusion of the going value in the appraisalment is not assigned as error in the petition for the writ of certiorari, nor claimed in the brief in support of the petition to have been erroneous, the question is now raised by counsel for the city (Brief, p. 60). Without any concession that the question is properly before this Court for review, it will nevertheless now be discussed.

1. In the order made in the appraisalment suit, November 29, 1905, it was, among other things,

ordered that if the appraisers, acting as a board of appraisers, should find that the water company had "a going value as distinguished from the un-expired franchise" they should separately state and report the amount thereof as a distinct and separate item of valuation, both with respect to the entire property and with respect to the property exclusive of the portion of the water plant in South Omaha, Dundee, East Omaha and of the distribution mains in Florence (Record, p. 504).

In the transactions of the American Society of Civil Engineers, No. 813, there is a discussion of the method of determining the going value, with special reference to the case of the Kansas City Water Works, by Mr. Moore, one of the appraisers in that case, concluding as follows:

"In the Kansas City case, as in most similar cases, the franchise had expired, and the city had refused to renew it. The company had therefore no right to continue the business at all. The one thing to be valued was the property in working order with the private attachments all made, and a body of patrons ready to take water. The value of all this was the amount of money it would have cost the city at the time of the transfer to replace the property in the same condition in which it was actually found.

The problem of valuation in this and like cases involves, therefore, as already intimated, a consummation of the following elements:

First.—A valuation of the real estate owned and occupied.

Second.—An estimate of the amount of money necessary to replace the plant, including buildings, reservoirs, machinery, pipes, etc., in its present physical condition, exclusive of interest.

Third.—Interest on this amount during the time which would ordinarily and reasonably be required for construction.

Fourth.—A further allowance of interest for such additional time as would probably be required to work up the business to the same standard as that found at the time of the transfer.

These estimates and allowances should all be made upon a fair and reasonable, or even liberal, basis; but when so made, everything has been done which either justice or equity requires."

(Vol. XXXVIII, p. 151, December, 1897.)

The maps and inventories furnished the appraisers by the company necessarily included not only all the public hydrants, but all the private attachments of the system. The appraisers were therefore in possession of all the facts needed for a proper estimate of the going value of both portions of the system, without resort to the company's books of account.

Following the instructions of the order, the appraisers separately appraised the going value of these portions, and separately stated the going value of each in their report (Record, p. 165). As there was no effort made in the case to impeach the method employed or the amounts arrived at with respect to these estimates of going value, the only question to be considered, if it can be considered in this case, is whether or not the appraisers were justified in including any going value in their appraisalment.

2. Under the reasoning and authority of the leading decisions upon this subject, there can be

no reasonable question that the estimate of the valuation of these water works for the purpose of their purchase by the city properly included an estimate of their going value.

While, by the terms of Ordinance 423, it is expressly provided that nothing shall be paid for the unexpired franchise of the company, there is nothing in the ordinance from which it can be even inferred that no allowance was to be made for the going value.

The testimony given on behalf of the city by persons present at the time the ordinance was drawn, to the effect that it was not then supposed that the city would have to pay for any going value, in case of a purchase, not only contravenes all the rules of evidence with regard to the construction of unambiguous written instruments, but can have no weight in any aspect of this question. If, as these witnesses testify, going value was not then discussed, it certainly could not have been excluded.

Upon this question, the decision in the leading case of *National Water Works Co. v. Kansas City*, 62 Fed. R. 853, is controlling and conclusive.

In that case, in which the element of going value was established for the benefit of all future appraisers of water works, *the franchise had expired* and therefore could not be considered as an element of value, any more than in the case now before the Court (pp. 864, 865).

An estimate of going value "does not include an estimate of the value of a continuance of earnings," for, as stated in the Kansas City case, "a continuance of earnings rests upon a franchise to operate the water works." But the going value does include, as explicitly held in that case, the

value of a plant capable, from its connections and actual operation, of producing an immediate large income to the purchaser.

While the franchise would be essential and valuable to any other water company purchasing the works, the city had no need to acquire it, because it had, under the statute, full authority to use its own streets and its own public property for the purposes of water works. The exclusion of any payment for the unexpired franchise was, therefore, merely a natural precaution.

Going value is neither franchise value nor good will, but is the value of the works as a going concern, as a concern which is a live entity, not a dead plant.

As was said in the Kansas City case,

“It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that ‘the fair and equitable value’ is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the

individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a water works system without a single connection between the pipes in the streets and the buildings adjacent? Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the water works, and inducements held out therefor. The city, by this purchase, steps into possession of a water works plant, not merely a completed system for bringing water to the city, and distributing it through the pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. *It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn*" (p. 865).

Gloucester Water Supply Co. v. Gloucester, 179 Mass., 365, was a case where the purchase of the company's water works by the city involved, under the terms of a legislative act, the payment to the company of "the fair value of its property" with the further explicit provision that "such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of the company."

The commissioners appointed to determine the price, made, nevertheless, an allowance in their estimate based upon the fact that the plant was a going concern, and in full operation at the time of the transfer. To this allowance the city objected on the appeal, but the allowance was sustained by the Supreme Court of Massachusetts.

The court said:

“It is plain that the real, commercial market value of the property of the water company is, or may be, in fact, greater than ‘the cost of duplication, less depreciation, of the different features of the physical plant.’” Citing *National Water Co. v. Kansas City*, 62 Fed., 853.

Also:

“We think it is plain that there is nothing in the provisions of section 16 of the act in question, St. 1895, c. 451, forbidding the commissioners considering this element of value, which, as we have seen, in fact exists * * *

It is plain that the element of value which comes from the fact, that the property is sold as a going concern in which case it has, or may have, in fact a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute” (pp. 382, 383).

Norwich Gas & Electric Co. v. The City of Norwich, 76 Conn. 565, was a case where the “fair market value” of the property purchased by the city was to be appraised, but neither franchises nor good will.

The commission reported that, in reaching its valuation, it had considered that the plants were going concerns, and that their output had been

increasing, and had taken into account their earning capacity and the fact that the company had an established business built up at the risk of private capital after experiments and changes during a long period. On appeal to the Supreme Court of Connecticut, the city contended that the valuation ought to have been confined to the bare physical plant, and that in effect the commission in this instance had put a value on the franchise and good will, although it excluded them in form.

The court held, with respect to the action of the commission in this regard:

“It would not have fulfilled its duty had it estimated the sum to be paid in view only of what the lands, buildings, pipes, wires and other apparatus were worth, considered as separate items. They were to be valued in view of their arrangement for and adaptability to the purposes for which they were provided, *and of their earning capacity as a going concern*” (p. 576).

The court cited, with entire approval, *National Water Works Co. v. Kansas City*, 62 Fed. R., 853, as well as *Gloucester Water Supply Co. v. Gloucester*, 179 Mass., 365.

The “going value” was not an issue in the case of *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, but was assumed to have been a proper element of the valuation of the water works in question for the purposes of determining reasonable rates (p. 9).

The case of *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, is not a case in point, since “going value” is essentially different from “good will”.

Therefore, upon general principles, as well as under these leading authorities, the appraisers

were entirely right in finding that the property of the Omaha Water Company included in the purchase had a going value, as distinguished from the unexpired franchise.

POINT VIII.

The valuation by the Board of Appraisers was properly made as far as practicable as of the date of their report.

While no error in this regard is assigned in the petition for the writ of certiorari, or claimed in the brief in support of the petition, it is now claimed by counsel for the city that "the law requires the valuation to be fixed as of the date of the election to purchase" (Brief, p. 73).

In the bill of complaint in the appraisement suit, verified by the then chairman of the water board, it was averred that the company was contending before the appraisers that they should estimate the value of the property as of the date of the passage of the ordinance of election to purchase the works, and that the City of Omaha was contending that the value of the plant should be fixed and determined as of the date of the award, and it was alleged that, if fixed as of the date of the passage of the ordinance, the estimate of value would be \$200,000 or more greater than the estimate if found and returned as of the date of the award. The bill went on to aver "that if said award shall be made either as of the date

of the appointment of the board of appraisers, or as of a term of years, the said award will be nugatory and void" (Paragraph XVI, Record, pp. 378, 379).

The water company, in its answer, denied that it had contended before the appraisers, or was contending, that the property should be appraised as of the date of the passage of the ordinance of election, but admitted that the complainants were contending that the value of the plant should be fixed and determine as of the date of the award, and while admitting that there might be a difference in value, depending upon the date of estimate, denied any knowledge or information sufficient to form a belief as to what such difference would be (Paragraph XIII; Record, p. 407).

The order entered November 29, 1905, on the motion of the counsel for the city in this appraisal suit, after giving specific directions to the appraisers with regard to their method of appraisal in certain respects, ends thus:

"It is further ordered that the appraisers aforesaid make and return the aforesaid values as far as practicable under the evidence and to the best of their judgment as of the date of the award" (Record, p. 504).

It thus appears that the instruction of the court to the board of appraisers to return their estimate of values as of the date of their report was the definite and final outcome of the application of the water board, and was procured by its counsel

If the board of appraisers had attempted to make the estimates of values as of any other date

than that of their report, they would, of course, have been guilty of contempt of court for the violation of this order.

In their report the appraisers say:

“In accordance with the 8th paragraph of the order of the Court, the appraisers report that the aforesaid values as far as practicable have been made under the evidence and to the best of their judgment as of the date of this award” (Record, p. 165).

In the resolution adopted by the water board on July 9, 1906, after the report was made, it is declared that whereas the two engineers signing the report did not arrive at their valuation as of the date when the ordinance of election was passed and approved, but set down in their report what purported to be their estimate of the valuations of the properties as they existed July 7, 1906, and that in the meantime the prices of iron pipe, water mains, hydrants, valves and machinery had greatly enhanced, therefore, by the adoption of the last named date as the one for fixing the valuation, the City of Omaha had been greatly wronged and damaged, and the valuation as fixed in the report was “illegal and void” (Record, p. 168).

This declaration is virtually reiterated in the answer of the city in the present suit, with the express averment that the engineers “were required under and by virtue of their appointment and the law of the case, to make and return an estimate of valuation as of the date when the city elected to purchase the plant,” and that by reason of the fact that the estimate is not an estimate of the valuation as of the date of the elec-

tion to purchase, the report is "null and void" (Paragraph 23, Record, p. 28).

Prior to the coming in of the report, counsel for the city, in support of their contention that the estimate must be made as of the date of the report, relied upon the decision in *Gloucester Water Supply Company v. Gloucester*, 179 Mass., 365.

Whether or not the original contention or the present position of counsel for the city is right as a matter of law, they cannot now be allowed to impugn the validity of the valuations which have been made as of the date established by order of the court, upon the insistence of counsel for the city.

POINT IX.

By the terms of the ordinance of election the scope of the city's purchase was nothing less than the entire system of water works owned and operated by the Omaha Water Company, wherever located.

1. Neither in the title nor in the body of the ordinance of election of March 2, 1903, is there any ambiguity with respect to the purpose of the city council in availing itself of the right of purchase enuring to the city through the contract contained in Ordinance 423.

The title of the ordinance of election reads:

"An Ordinance declaring that it is necessary and expedient that the City of Omaha

purchase the system of water works operated by the Omaha Water Company, and providing for notification to the water board and to said water company to each select one engineer as an appraiser to ascertain the valuation of said water works plant."

Following the terms of this title, section first of the ordinance reads:

"The mayor and council of said City of Omaha do hereby declare that it is necessary and expedient for said City of Omaha to purchase the system of water works operated by the Omaha Water Company, and do elect and determine to purchase and acquire such water works plant by virtue of the rights enuring to said city through the contract between said city and the grantors of said water company, and as authorized and provided by section 14 of Ordinance No. 423" (Record, p. 160).

The contention set forth in Paragraph XIII of the answer in this suit, that it was not the intention of the city council by that election to purchase or acquire any portion of the water works owned by the company, except such as were within the City of Omaha and necessary and appurtenant to the supplying of the city and its inhabitants with water, finds no support in any language of the ordinance. The claim of counsel for the city that the reference in the body of the ordinance of election to section 14 of Ordinance 423, limits the intended purchase to such water works as are precisely described in Ordinance 423, and defines the scope of the purchase by that description, is inconsistent with any reasonable construction. Counsel, indeed, find it impossible to adhere to the strict logic of their argument, which

would necessarily restrict the purchase to the original supply station.

Through circumstances, and by reason of the enlargements and the extensions, both of the supply stations and the distributing mains, which the city authorities, with full knowledge, have acquiesced in during a long period of years, it is inconceivable that the city council, by describing in the most comprehensive language possible the scope of the purchase, really intended to take less than the entire system. Had such limited purpose existed in the minds of the city council, it would have been quite as easy as not to have expressed the narrower intention. Every limitation on the extent of the purchase which has at any time been insisted upon by any of the counsel for the City of Omaha could perfectly well have been expressed in the ordinance of election.

The reference which the ordinance of election makes to section 14 of the Ordinance of 1880, cannot, when taken in connection with the other language of the ordinance of election, be regarded as equivalent to a declaration that the city merely elected to purchase whatever it might be held that the terms of that section gave it the right to take. On the contrary, the declaration that the mayor and council elected and determined to purchase and acquire the system of water works operated by the Omaha Water Company "by virtue of the rights enuring to the city through the contract between said city and the grantors of said water company, and as authorized and provided by section 14 of Ordinance No. 423," is an express claim on the part of the city of the right to make such comprehensive purchase by virtue of the terms of that section.

The city council having thus, in unequivocal language, claimed a construction of section 14 of Ordinance 423, and of the ordinance itself, which would permit the purchase of the entire system of water works operated by the Omaha Water Company, it must be held that it was for the appraisalment of this entire system that the city council appointed Mr. Alvord as its appraiser. The water company accepted that interpretation of the contract and appointed Mr. Benzenberg as the second appraiser, to value just that system and nothing else. The two appraisers thus selected appointed Mr. Mead as the third appraiser, for the same purpose and no other.

Thus, by the action of the parties, construing the ordinance with a view to the powers conferred by the statute, the scope of the contemplated purchase became irrevocably fixed, and it only remained for the contract of purchase to become absolutely complete through the determination of the price by the method which the original ordinance prescribed.

The company's view of the intended scope of the purchase seems to have been accepted by the Circuit Court in passing upon the motion for a continuance of the injunction in the appraisalment suit. In the opinion thereupon rendered the court said:

"It is true, on the other hand, I think, that the ordinance which was passed by the city council, under which the appraisers were selected and appointed, sought, at least, to take in the entire system of water works. To that effect is the title of the ordinance and that is what they say—they say they have the authority to do it under and by virtue of that Ordinance No. 423."

As said in *Knox County vs. National Bank*, 147 U. S., 91:

“It is a familiar rule that the interpretation given to a contract by the parties themselves is competent, and oftentimes very weighty, evidence in determining its meaning and force” (p. 99).

And as said in *Manhattan Life Ins. Co. of New York vs. Wright*, 126 Fed., 82:

“The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error” (p. 87).

See also

District of Columbia v. Gallaher,
124 U. S., 505, 510.

Insurance Co. v. Dutcher, 95 U. S.,
269, 273.

2. If there were any ambiguity in the ordinance of election, such extrinsic evidence as there is in the case would go to show that the city council, in passing the ordinance, and the mayor, in approving it, meant just what the ordinance says.

At a public hearing before the appraisers, July 20, 1903, soon after their organization, Governor Boyd, then chairman of the water board, declared: “The city, I believe, wants to buy the entire works * * * I believe that is the opinion of nine-tenths of this city. We want to purchase

the entire property if we possibly can do it. We expect to do it " (Record, p. 659).

There is nothing in the evidence to show that the agitation, continued for years, for municipal ownership of the company's water works, ever contemplated the ownership by the city of anything less than the entire plant, wherever located.

It appears that the question of power in the city to own and operate portions of the works located outside of the city limits was originally suggested by Mr. Congdon, a lawyer, who was a member of the water board (Record, pp. 464-467). Although it was early raised before the appraisers by the then city attorney, who has since been counsel for the water board, no action was taken, nor, so far as appears, was any action attempted, on the part of either the city council or the water board to rescind or modify the ordinance of election, or to limit the scope of the purchase declared by that ordinance.

The silence of the city authorities during this period of three and one-half years, during which the proceedings were pending, with full knowledge on the part of the city council and the water board, which they must be presumed to have had through their counsel, if not otherwise, of the course the proceedings were taking, is not only highly significant, but should be regarded as legally conclusive, with regard to the real intention of the ordinance of election.

It is certain, also, from official action of the water board and the affirmative vote of the electors of the city, since this case was brought here for review, of which action and vote this court is asked to take judicial notice, that the water board regards the purchase as intended to include the

entire system of water works, and that the electors of the city have authorized an issue of bonds for the avowed purpose of paying for the entire system (See pp. 166-174 of this Brief).

3. It may well be held, moreover, that the city is equitably estopped from now claiming that it has never been its purpose to acquire the entire system of the complainant.

In its bill of complaint and in its amended bill in the forfeiture suit brought by the city in 1896, to which the Omaha Water Company was made a party, the city asserted that it had the power to own and operate this entire system of water works, and claimed the right to forfeit the entire system under section 11 of the Ordinance of 1880, which in its terms is no more comprehensive than section 14 of Ordinance 423, and which specifically makes the method of compensation in case of forfeiture the same as the method of determining the price in the case of a purchase (Record, pp. 668, 679).

It is clear, under the authorities, that an equitable estoppel may arise in such a case, applicable to a municipal corporation as well as to any other corporation or to an individual.

Reynolds v. Adden, 136 U. S. 348;
Hackett v. Ottawa, 99 U. S. 86, 96;
County of Randolph v. Post, 93 U. S. 502, 513;
Bissell v. City of Jeffersonville, 24 How. 287, 300;
Sullivan Timber Co. v. City of Mobile, 110 Fed. 186, 197, 198;
Brooks v. Laurent, 98 Fed. 647;
Garber v. Doersom, 117 Pa. St. 162;
Munroe v. Danbury, 24 Conn. 199.

It is not an answer to the claim of an estoppel to assert that the city was unsuccessful in the forfeiture suit, and therefore is not estopped by the averments and claims of its bills. That suit was not defeated on the ground that the city could not claim, if a case of forfeiture were made out, that all the property described could not be included in such forfeiture, nor on any denial that it could be included. The suit failed simply because the company's contention that no case of forfeiture was made out by the city was sustained. Nor is it enough to say that the city could not be estopped by a pleading verified by the city attorney. If the authority of the city attorney to bind the city by a pleading is not sufficient, how can any attorney so bind a client?

Especially should the city be held to be estopped where the city authorities stand by and see a suit or an appraisal go on to a completion, without any official withdrawal of the claims made in a bill of complaint or ordinance. The averments of the bill and amended bill in the forfeiture suit show at least that the city then placed the same construction on the scope of Ordinance 423 which has been placed on it by the city council in passing the ordinance of election in 1903.

As said in *State ex rel. Tarr v. Mayor and Council of Crete*, 32 Neb. 568, and by the Circuit Court of Appeals in the hydrant rental case of *Omaha Water Company v. City of Omaha*, 156 Fed. R. 922, "A city like an individual should act in good faith in carrying out its contracts."

There can, then, be no serious question that the scope of the city's intended purchase was nothing

less than the entire system of water works operated by the Omaha Water Company, and that such must be held, for the purposes of this suit, to be the scope of such purchase.

POINT X.

The City of Omaha had ample power to make the purchase of the entire system of water works operated by the Omaha Water Company.

1. While conceding the established rule to be that municipal corporations can exercise no powers which are not in express terms, or by fair implication, conferred upon them, counsel for the respondent contend that the City of Omaha has ample statutory authority to acquire and own and operate the entire system of water works owned and operated by the Omaha Water Company.

Under the provisions of the Nebraska statute of 1879, amending the act to incorporate cities of the first class, the mayor and council had the undoubted power to provide, on behalf of the City of Omaha, as one of the terms of the contract with Locke, that the city should have the right, at any time after the expiration of twenty years, to purchase the water works at an appraised valuation. Such a provision has repeatedly been held to be properly an incidental part of a main agreement for the construction of water works and the sup-

ply of water to municipalities for public and domestic purposes.

Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 10; and cases there cited.

See also *City of Indianapolis v. Consumers Gas Trust Co.*, 144 Fed., 640;

City of Fayetteville v. Fayetteville Water, L. & P. Co., 135 Fed., 400.

The valid exercise of such option by the City of Omaha under the Ordinance of 1880 has been expressly recognized in *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 7.

When the ordinance of 1880 was passed, the City of Omaha had statutory power, under that Act of 1879 "to erect, construct and maintain water works either within or without the corporate limits of the city." Yet, inasmuch as advantage of the provision for purchase could not be taken for at least twenty years, the ordinance may be held to have contemplated such a situation, legally considered, as would exist at the time of the exercise of the option.

The question of power in this case, may, therefore, be resolved by consideration of the statutory authority with which the City of Omaha was clothed on March 2, 1903.

Prior to March, 1903, the City of Omaha had become a metropolitan city—and the only metropolitan city—within the classification established by the statutes of Nebraska. As such, it then had,

under Section 135 of the city's charter of 1897, as reiterated in the amendment to that section in Chapter 12 of the Laws of 1903, "power to erect, construct, purchase, maintain and operate . . . water works . . . either within or without the corporate limits of the city, and power to fix, charge and collect a rental or compensation for the use of . . . water . . . and to make all needful rules and regulations concerning the use of such . . . water . . . and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same" (See Appendix to this Brief).

Under Section 27 of this Charter of 1897, the City of Omaha also had, in 1903, power "to appropriate private property for the use of the city for . . . water works, including mains, pipe lines and settling basins therefor, the right and power to appropriate private property for . . . water works to extend for a distance of ten miles from the corporate limits of the city"; also, the power "to appropriate any water works system, plant or property already constructed to supply the city and inhabitants thereof with water or any part thereof, whether lying or being wholly within said city, or any part therein, and any part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, business, reservoirs, and all appurtenances reasonably necessary thereto and a part thereof or connected with said system, plant or property, and franchises to own and operate the same, if any" (See Appendix to this Brief).

Apart from this broad authority to purchase and operate water works "either within or without the corporate limits of the city" the City of Omaha was, by Chapter 12 of the Laws of 1903, not only empowered, but required, to construct or purchase *a system of water works*.

By section 1 of this Act, it was made the duty of the mayor and council, within a limited time, in a case where bonds had been voted for the construction or purchase of a water plant, to "declare by ordinance, that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works."

It was further, by section 3, declared that, in a case where bonds had been previously voted for the purchase of a water plant, as was the case in the City of Omaha, it should be the duty of the mayor and council to "proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights enuring to such city, through contract or otherwise."

The act goes on to prescribe the procedure for the appointment of appraisers in the case of such a purchase and for the appointment also of a water board to have general charge and supervision of the water plant constructed or purchased, and the appointment of a water commissioner to act as secretary of the board and to have general supervision and management of the construction or operation and maintenance of the water plant, subject to the direction of the board, with other extensive provisions relative to the purchase, construction, maintenance and management of a water works plant (See Appendix to this Brief).

Nowhere in the act is there any attempt to restrict the broad power of purchase and operation given by section 135 of the charter of 1897, but that section is expressly re-enacted in this act of 1903. The comprehensive description of "a system of water works" as the contemplated subject of the purchase thus virtually required by the first section of this enactment, remains unqualified throughout the act. Furthermore, section 10 of the act expressly declares that "the authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles."

It was in pursuance of this legislative direction and in accordance with this legislative authority and reiterated charter power, that the mayor and council, by the ordinance of election, declared that it was necessary and expedient for the City of Omaha to purchase and acquire the system of water works operated by the Omaha Water Company, and to acquire such water plant by virtue of the rights enuring to the city through the contract in Ordinance No. 423.

It is evident that the language of section 27 of the charter of 1897, which was not restricted in any degree by the act of 1903, and which expressly authorized the City of Omaha "to appropriate any water works system, plant or property already constructed to supply the city and the inhabitants thereof with water," had reference directly and solely to the water works system of the Omaha Water Company.

It is also obvious from the language employed, that the power granted to the city by the reiterated section 135 of the charter of 1897, to pur-

chase, maintain and operate water works either within or without the corporate limits of the city, could only have reference to the water works of the Omaha Water Company.

It is equally unmistakable that, when the act of 1903 referred to the purchase by the City of Omaha of "a system of water works," under the powers granted by the charter of such city, or by virtue of any rights enuring to the city through contract, it had exclusive reference to the system of water works then operated by the Omaha Water Company, including all existing extensions.

It is undisputable that the language employed in each of the sections cited from the charter of 1897 and from this act of 1903 is fully broad enough to authorize the acquisition by the City of Omaha of title to a system of water works without geographical restriction.

The evidence in this case shows that in the year 1903, and for more than ten years before, the system of water works operated by this company consisted of a supply station at Florence as well as a supply station within the corporate limits of Omaha, and distribution systems in Florence, South Omaha, Dundee and East Omaha as well as in Omaha, and that, except at Florence, these distribution mains received their supply of water from mains passing through Omaha, all being fed from the same supply stations as Omaha itself, and being operated in all respects as inseparable parts of one system of water works, with only one available source of supply (Record, pp. 572, 578).

Apart from proofs in the case, the court can take judicial notice that, during the whole of this

period, this state of facts must have been well known not only to the city authorities of Omaha, but to its citizens generally, and to the members of the Nebraska legislature.

It is therefore not only a reasonable, but inevitable, construction of the provisions of the city charter and the act of 1903, expressly authorizing the purchase of "a system of water works", that it was the intention of the legislature thereby to describe the system of water works then generally known to be operated as an indivisible system by the Omaha Water Company.

2. It was not inconsistent for the legislature of Nebraska to authorize the acquisition and operation by the City of Omaha of the portions of the company's distribution system that were located without the limits of Omaha and within the limits of other municipalities, nor was it contrary to the public policy of the State.

Counsel for the city have heretofore argued in this case that the City of Omaha has no more power to purchase a water plant in South Omaha than it would have to purchase and maintain the parks of South Omaha; and the statement would apply equally to parks in any adjacent municipality. But the Court can take judicial notice of the geographical fact that the City of Omaha has purchased, and does maintain, a park outside its corporate limits—namely, Elmwood Park.

And this the City of Omaha does under the express legislative authority of section 101-b of the city charter of 1897 (not affected by the Act of 1903), which authorizes the acquisition by the City of Omaha of a "system of public parks, parkways and boulevards, or additions thereto, within

the city, or within three miles of the limits thereof," and expressly authorizes the mayor and council, upon the recommendation of the park commissioners, and with their concurrence, to purchase, in the name of the city, lands within such limits, to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands within the corporate boundaries of other cities or villages; and if such lands are within the limits of other cities or villages, said cities or villages are to cease to have any jurisdiction over such lands, after they are acquired for parks, parkways or boulevards, whether by gift, purchase, condemnation or otherwise (See Appendix to this Brief).

Thus the legislature has authorized the City of Omaha to acquire by purchase or condemnation lands for parks, parkways, and boulevards within the corporate limits of any adjacent municipalities, if not more than three miles from the city limits, and thereby not only to invade the territory of these adjacent municipalities, but, without references to the wishes of their authorities, to acquire jurisdiction over all the properties thus acquired.

There is, therefore, nothing in the law or policy of the State of Nebraska with respect to municipal corporations, inconsistent with the acquisition or operation by the City of Omaha of the distribution systems now operated by the Omaha Water Company within Florence, South Omaha, Dundee or East Omaha.

As the statutory authority stood prior to March, 1903, there was thus not only power in the City of Omaha to operate, as well as own, the portions

of the company's system of water works lying within these adjacent municipalities, but such power was by fair, and indeed necessary, implication, confirmed by the Act of 1903, in authorizing the purchase by the city of this "system of water works" and providing for its subsequent operation by the water board, whose powers in that regard were expressly extended as far beyond the corporate limits of the city as the board might deem necessary, not exceeding ten miles.

3. While no subsequent legislation could restrict the scope of the purchase which the city, in March, 1903, elected to make under the statutory authority then existing, the question of the effect of any enabling provisions in subsequent statutes may properly be considered. Chapter 15 of the laws of 1905, amending section 7661 of "Cobbey's Annotated Statutes of Nebraska, 1903," contains this clause (Sec. 242 Compiled Statutes of 1907, *post*):

"The water board may contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes, or may contract, to the same end, with any person, co-partnership, or corporation, supplying any such adjacent municipality with water for domestic, public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that all water so furnished shall be measured by meter at the expense of such municipality, person, co-partnership, or corporation, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such metropolitan city and its inhabitants by such mu-

nicipal water plant; provided, further that in computing the income of such water plant, each fire hydrant located within such metropolitan city shall be assumed to produce a reasonable revenue to be definitely fixed by said board."

This act clearly invests the City of Omaha with full power to make with any municipality adjacent to the city any contract to supply such municipality with water for domestic, mechanical, public or fire purposes, which any prior owner of a distribution system within such adjacent municipality might make.

The further power to contract, to the same end, with any person, co-partnership or corporation, supplying any such adjacent municipality with water for domestic, public or fire purposes, involves a clear authority to take over any existing contract or contract rights, which such corporation may have for such purposes.

Applied, as it must have been intended to be, to the existing situation, the Omaha water board is thus given ample authority to make with the City of Florence, or the City of South Omaha, or the Village of Dundee, or any other adjacent municipality, essentially such a contract for supplying each one and its inhabitants with water for domestic, mechanical, public or fire purposes as the Omaha Water Company itself, and its predecessors, were authorized to execute, and did execute, with the City of Omaha, the City of Florence, the City of South Omaha, and the Village of Dundee, to supply all those municipalities with water for such purposes.

By authorizing the water board to "contract with any municipality adjacent to such city to

supply such municipality with water for domestic, mechanical, public or fire purposes," or to "contract, to the same end, with any corporation supplying any such adjacent municipality with water for domestic, public or fire purposes," the act in effect declared the purpose of the contract to be the same in both cases. When the act referred to a corporation "supplying any such adjacent municipality with water for domestic, public or fire purposes," it described the Omaha Water Company, which was then supplying private consumers in South Omaha, as well as the city itself, with water.

The use of the same language with regard to the supply which the water board may contract to give permits a supply equally extensive. In other words, the description in the act of a "corporation supplying any such municipality with water for domestic, public or fire purposes" necessarily describes a corporation which is supplying private consumers as well as the municipal corporation, and the same descriptive language with regard to the supply which the water board may contract to furnish must necessarily have a co-extensive meaning.

Moreover, authority to supply a municipality with water for domestic and mechanical purposes should seem to involve power to supply private consumers within the bounds of such municipality. Such is the description of the power granted to the water board by the act of 1905, as well as the power described as being exercised, and known to be exercised, by the Omaha Water Company.

4. There is no inconsistency in the use of the word "municipality" in the act of 1905 in two

senses. The word may have, like the word "City" and the word "Village," a geographical as well as governmental meaning.

State v. Elliott, 158 Ind., 168; 63 N. E., 222;

Miller v. Town of Jacobs, 70 Wis., 122; 35 N. W., 324.

The comprehensive language used in the act to embrace adjacent municipalities is equivalent to saying that the water board may contract with the City of Florence and the City of South Omaha to supply such cities and their inhabitants with water for private and public purposes, and may contract with the Village of Dundee to supply such village and its inhabitants with water for the same purposes. In other words, the City of Omaha is given power to make with the other municipalities contracts of precisely the same type as the existing contracts which those municipalities and the City of Omaha now have with the Omaha Water Company.

5. The argument that has been made by counsel for the city that all rules of construction applicable to municipal charters and powers, when applied to the act of 1905, preclude the idea "that the City of Omaha is going into the water business as a private corporation might do," falls short of the mark at which counsel is aiming. For, as matter of fact, through the purchase of any part of the company's system of water works, the City of Omaha is necessarily going into the water business as a private corporation might do. The supplying of water to the inhabitants of a city is not within the inherent general powers of a

municipality. Although necessarily partaking of a public character, it falls under the head of business powers instead of governmental authority, and can only be undertaken with express legislative sanction.

Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed., 271, 282;

Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed., 1, 11;

As said in *Lehigh Water Company's Appeal*, 102 Pa., 515:

"The gas cases established the principle that a municipal corporation may perform the functions of a private corporation in supplying its citizens with gas and water" p. 528).

See also *White v. Meadville*, 177 Pa., 643.

Therefore, the purchase by the City of Omaha of a system of water works, to be operated under the charge of the water board for the supplying of the City of Omaha, and the citizens and inhabitants thereof, with water for domestic, public and fire purposes, while clearly a matter of public concern, necessarily involves going into the water business as a private corporation might do—in fact, going into the same water business which the Omaha Water Company is already conducting.

There is no conceivable difference in principle between authority of the water board to make a contract with any adjacent municipality to supply such municipality with water for domestic, mechanical, public or fire purposes, and the undertaking to supply the City of Omaha itself with water for precisely the same purposes, or to con-

tract to the same end with a corporation already supplying such adjacent municipality with water for all of those purposes. It is "going into the water business" in any case, and there is express legislative authority for it in every case.

The power expressly conferred on the water board to contract with any adjacent municipality to furnish such municipality with water for all the purposes specified, necessarily confers on each adjacent municipality adequate authority to enter into such a contract on its part, even if the authority were not already ample under previous statutory authorizations.

6. With such broad authority in the City of Omaha to contract with adjacent municipalities to supply them with water for all purposes, the question of title to the distribution mains and hydrants within the boundaries of those municipalities becomes a subordinate matter. The power to acquire title to such property is clearly within the terms of section 135 of the city charter and the terms of the act of 1903, and the city can as properly distribute the water through those vehicles as sell it at the city limits.

A similar question was raised in the case of the Kansas City purchase, where it was objected that the city, by virtue of certain amendments to its charter and certain acts of the legislature, had become disabled from taking the title to all the property which made up the water works system. The objection in that case was raised by the company. Passing on the objection, the Court said:

"This is a matter in respect to which the company need not concern itself. If it is paid the fair and equitable value of the property, as provided by the contract, then its rights

have ceased, and the city can settle with other parties the matters of title and possession.

National Water Works Co. v. Kansas City, 62 Fed. R., p. 864.

Subject to the right of the City of Florence to a perpetual supply of water for public and private uses by reason of underlying agreements, the City of Omaha, on acquiring the company's system of water works, will acquire also the valuable rights which the Omaha Water Company has by virtue of contracts with the other adjacent municipalities. The same is true of the distribution system within the boundaries of East Omaha, which the East Omaha Land Company has not exercised the option to purchase, leaving the water company free to convey the same to the City of Omaha.

If the Omaha Water Company, a private corporation, could own and operate a distribution system in the adjacent municipalities for the supply of those municipalities with water for domestic, public and fire purposes, the legislature naturally could see no good reason why the City of Omaha should not be clothed with the like power.

None of the adjacent municipalities has raised the slightest objection to this.

7. The legislation of 1905, amplifying specifically existing authority, must be presumed to have been enacted in view of the circumstances of the situation, community of interest and future closer relations between the City of Omaha and these adjacent municipalities—and of an ultimate consolidation, which the experience of all great municipalities in this country makes absolutely certain.

8. The provision in the Act of 1905 that for water furnished by the City of Omaha to adjacent communities the rate per thousand gallons, fixed by the water board, shall not be less than the gross average income per thousand gallons for all the water furnished the City of Omaha and its inhabitants from the one municipal water plant, may be regarded as relating primarily to a method of measurement of the water with a view to equality with respect to price. Whether or not in actual operation the method would succeed or fail cannot be considered in determining the power of the City of Omaha to purchase and operate the entire system of water works under pre-existing statutory authority. If this provision be regarded as contemplating a wholesale flat rate and settlement only with the adjacent municipality, instead of individual consumers, it may still have to bear the test of equality of price to which the city, as owner, might be held to be subject; but the effect of the provision in this regard could not retroact restrictively upon the previous exercise of an ample statutory power of purchase.

It certainly is not to be presumed that the legislature of Nebraska, in passing this act of 1905, intended to discriminate against these adjacent municipalities or their inhabitants.

If the act of 1905 be regarded as intended to restrict the acquisition by the City of Omaha to so much of the respondent's system as lies within the corporate limits of that city, in connection with the supply system at Florence, as is contended by counsel for the city, that purpose could only be accomplished in case of the failure of the purchase elected to be made in 1903.

As pointed out by the Circuit Court of Appeals, such provision, if given the construction so contended for, would produce a result, as regards the water company, so inequitable that it cannot be presumed to have been intended. That would mean that the City of Omaha, upon payment of \$487,224.17 less than the valuation placed by the appraisers on the entire system, would acquire a property more valuable to it than the system in its entirety would really be. For it is manifest that it would be more profitable to the City of Omaha to furnish water to the adjacent communities, as customers, without obligation to maintain their distribution mains and hydrants, than if it were the responsible owner of such mains and hydrants. But, whatever the result or the intention of this provision of the act of 1905, it cannot avail to defeat the present purchase or restrict its scope or serve as a defense to this suit.

9. Relevant here is the decision in *Peabody v. Westerly Water Works*, 20 R. I., 176, where a taxpayer of Westerly, Rhode Island, brought suit to enjoin the purchase by that town of the plant of the water works company, located partly in the town and partly in the neighboring towns of Stonington and North Stonington, Connecticut.

There had been no legislation on the subject by the Connecticut legislature, nor had the towns of Stonington and North Stonington acted with reference to the purchase and transfer of the portion of the plant within their corporate limits. The legislature of Rhode Island, however, had authorized the water works company to sell, and the town of Westerly to buy, all the property and rights and franchises of the former, "whether

situate, held, enjoyed or exercised by it within or without the State of Rhode Island."

The Supreme Court of Rhode Island dismissed the bill and held the purchase to be valid. The court said:

"The claim that the water works cannot sell, nor the town acquire, that portion of the plant of the former situated in the towns of Stonington and North Stonington, Connecticut, rests on the assumption that the right granted by the legislature of Connecticut to the water works to construct and maintain that portion of its plant in that State, is merely a revocable license specially conferred on the water works. Granting this to be true, it is not to be assumed that the legislature of Connecticut will arbitrarily revoke the license *because of a change of ownership from the water works to the town. No reason is shown why the ownership of the plant by the town of Westerly, instead of by the water works, should be deemed objectionable by the legislature of Connecticut*" (pp. 178, 179).

It was not doubted by the court in that case that the town of Westerly might lawfully both purchase and operate an existing system of water works, extending not only into adjacent municipalities but into an adjacent State, without the necessity, and in the entire absence, of any concurrent action on the part of those municipalities or the State in which they were located.

10. None of the cases cited by counsel for the city is in conflict with this decision.

While, as held in *Farwell v. The City of Seattle*, 86 Pacific, 217, a city cannot undertake the scheme, as an original proposition, of construct-

ing works to supply an adjacent municipality with water, except under the most explicit legislative authority, there is nothing in municipal law to prevent the acquisition and operation of outlying portions which are an integral part of an existing system, having a common source of supply, which system the city has, by legislative enactments expressed in broad general terms, unqualified authority to purchase, with express supplementary authority to supply water to all the outlying portions.

The difference in circumstances of fact and of legislative authority, clearly distinguishes the present case from the other cases cited in the brief of counsel for the city, as well as the case last referred to.

Arnold v. Mayor of Pawtucket, 41 Atl. 576; 21 R. I. 15, furnishes no support to the construction claimed for the act of 1905 by counsel for the city. Two sections of a statute incorporating the Watchemoket Fire District were there considered. One of these sections was as follows:

"Sec. 9. Said district is hereby authorized to receive water from the City of Providence, or the town of Pawtucket, upon such terms as may be agreed upon by the city council of said city, or the town council of said town and said district, and said city and town are hereby authorized and empowered to supply water to said district and make such agreement."

So far, an authority was conferred which might be similar to that conferred by the Nebraska act. Under each statute authority was given to one municipality to contract with another to supply water to such municipality.

It does not appear that the agreement which was enjoined in the Rhode Island case would have been objectionable, except for the following section of the statute then under review:

"Sec. 10. Said *district* may distribute the water throughout the district, or authorize the same to be done, regulate its use and the price to be paid therefor, within and without the district, within the limits of the town of East Providence."

All that was held by the Rhode Island court was that the authorities of the City of Pawtucket could not enter into an agreement to furnish water to the inhabitants of the water district directly, "charging to and collecting from them water rents for the use of the water at the same rates charged by the city to its own inhabitants, and under the same rules and regulations", in view of the express language of Section 10 of the act, which required that the water be distributed, and its use and its price be regulated, only by the district itself.

No question of power of purchase was involved in the Rhode Island decision, but merely a question of allowable terms of agreement under express statutory restrictions.

The case of *Inhabitants of Quincy v. City of Boston*, 19 N. E., 519; 148 Mass., 389, turned wholly upon the construction of a statute defining the authority given the City of Boston to distribute water.

It was held that the statute in question did not contemplate such distribution to Long Island, an island in Boston Harbor, which, although territorially a part of the City of Boston, was three miles distant from the actual city. It was for

this reason that the court sustained an injunction, applied for by the inhabitants of Quincy, to prevent the laying of pipes through the highways of Quincy, in order to reach Long Island, and not because such highways were safe from invasion. For the court said:

“We shall assume that, if the city has power to carry water to Long Island, it has incidental power to carry it through the highways of Quincy” (p. 390).

In the present case, where the City of Omaha has general legislative authority to purchase “water works”, without as well as within its corporate limits, and special legislative warrant for the purchase of “a system of water works”—necessarily that of the Omaha Water Company—and express legislative authority to contract with adjacent municipalities to supply them with water for domestic and mechanical as well as fire and public purposes, this Court must surely conclude that the city has ample power to acquire and utilize to that end the pipes and hydrants already laid and erected and in operation within those municipalities, as a part of that system, and actually supplying water for those very purposes.

The decision in *Town of Bristol v. Bristol and Warren Water Works*, 49 Atl. 974; 23 R. I. 274—in so far as there was a decision—had reference to the peculiar circumstances of that case, which are not the circumstances of the case before this Court.

In that case, while the source of supply for both Bristol and Warren was from the same watershed, and the reservoirs of the company furnished water for both towns, the towns were so located

that each could be independently supplied and a complete separation made of the two systems. Even so, it was not clear to the court precisely how the separation should be made, and the case was therefore sent back to a master for an apportionment and estimate of relative values.

The present case, like that, must be decided with reference to its own circumstances. Here the communities adjacent to the City of Omaha, except Florence, which has an independent right to water distribution, necessarily receive their supply from mains passing through the City of Omaha and forming an essential part of a single water-works system. Not only do these communities depend for their water supply upon the mains laid through Omaha, but the consequently increased size and efficiency of these mains may, in an emergency, be to the advantage of Omaha and its citizens in the protection of their property.

The case before the Court is in certain aspects not unlike that of the *City of Duluth v. Duluth Gas & Water Company*, 47 N. W., 781; 45 Minn., 210. In that case an attempt to prevent the water company supplying the City of Duluth with water, from furnishing water also to places out of Duluth and in its vicinity through the mains laid in its streets, under ordinance of its council, was defeated. The City of Duluth had no power to contract for a supply of water to any community outside the corporate limits of Duluth, nor did the council attempt to do so. The court said:

“While the council could not contract that the defendant should supply any other place through the mains laid to supply Duluth (or by any other means), we do not think it an

objection to the exercise of the power to contract that other places may be supplied through the mains which the council contracts for. The council might, of course, have contracted for mains and pipes exclusively to bring the water to Duluth and its inhabitants, and it could not contract for laying through the streets, mains and pipes having no connection with that purpose. *But, that purpose being accomplished, we do not think it affects the contract providing for it that defendant may use the instrumentalities by which it is accomplished in the general business of its incorporation*" (p. 783).

This description of the situation at Duluth applies, in many respects, to the situation at Omaha. Of course, the city council of Omaha could not originally have contracted for the laying through its streets of mains and pipes having no connection with the purpose of supplying the city and its inhabitants with water. The council might, perhaps, have contracted for mains and pipes exclusively to bring the water to Omaha and its inhabitants, but it failed to do so. The primary purpose of supplying Omaha and its inhabitants with water being accomplished, the water company, predecessor of the appellant, could lawfully use the instrumentalities by which this purpose was accomplished to supply also, without detriment to Omaha and its citizens, the municipalities adjacent to the city.

The very language of the original ordinance contemplated the construction and maintenance of water works "within and adjacent to the City of Omaha" (Sec. 1, Record, p. 680).

The present situation at Omaha having, therefore, come about lawfully, may fairly be consid-

ered in all its features in arriving at a proper construction of statutes enacted with direct reference to such situation.

Where the legislative intent is apparent, that one municipality shall have authority to own and operate water works beyond its own limits, the courts invariably give effect to that intent.

In *City of Pittsburg v. Brace*, 27 Atl., 854, 158 Pa. St., 174, such authority was granted almost incidentally, and evidently with reference to an existing situation, the provision of the statute being that "the mayor, aldermen and citizens of Pittsburgh may, from and after the passage of this act, proceed to recover water rents due and unpaid beyond the limits of the city, as well as within the same, in the same way as city taxes are now recoverable." While conceding that the city could exercise no extra territorial jurisdiction without some special provision authorizing it, the court held that this provision was sufficient to authorize the collection of water rents through resort to a lien for water supplied outside the city.

Town of West Hartford v. Board of Water Commissioners, 36 Atl., 786, 68 Conn., 323, was a case where the source of water supply for the City of Hartford and the town of West Hartford was in that town. The act which authorized the City of Hartford to avail itself of this source of water supply provided that the City of Hartford should supply the inhabitants of West Hartford living within a reasonable distance of the water mains with water. After a time the water commissioners of the City of Hartford sought to limit the territory within which the inhabitants of West Hartford should be supplied. This was a situation

similar to that existing at Omaha with reference to the right of the City of Florence to a distribution system for public and domestic purposes.

Not only was the right of the inhabitants of West Hartford to insist upon the full continued supply sustained, but the court incidentally commented upon a situation similar to that now existing between the City of Omaha and the City of South Omaha.

With reference to the date of the original enactment the court said:

“At that time the City of Hartford did not include within its limits the whole of the town of Hartford. A large part of the territory and of the population of the town was outside of the city. *These people needed to be furnished with water quite as much as the people in the city itself*” (p. 333).

To the like effect is the decision in *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. R., 1.

At the time of the transactions passed upon in that case, the statutes of Colorado provided, with regard to Towns and Cities (2 Mills. Ann. Stat.):

“Sec. 4403, Sub. 67. They shall have power to erect waterworks . . . or to authorize the erection of the same by others” and

“Sec. 4403, Sub. 68. They shall have power to construct, or authorize the construction of such water works, without their limits, and for the purpose of maintaining and protecting the same from injury, and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains used in or necessary for the

construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which the same is taken."

Under this general authority the City of Colorado Springs had, by ordinance, granted for a term of years the right to lay, maintain and operate an electric lighting system throughout the streets of the city and to divert and use, for the generation of electrical power, all the water from sources controlled by the city, on condition that all water so diverted should be returned to the water system of the city unimpaired, and that the use thereof under the contract should not diminish the flow nor pollute the water. Subsequently, the city passed an ordinance repealing the ordinance described. Thereupon, the intervention of the court was invoked to have the repealing ordinance adjudged void, as violative of the constitution of the United States. The suit was defended on the ground, chiefly, that the City of Colorado Springs had no power to make the contract in question, or to vest in any one the rights and privilege bestowed by the original ordinance. On an appeal, the Circuit Court of Appeals declared the repealing ordinance invalid, and laid down principles applicable to the question under present discussion.

11. In so far as the construction of the acts of 1903 and 1905 may be aided by the facts of the situation, there is ample support in those facts for the intention which counsel for the company insist that the language of the acts discloses. Apart from the evidence in the case, the court, as was said in *Bryant v. Estabrook*, 16 Neb. 217, "must take judicial notice of the public geography and

history of the State"; and equally, it should seem, of Omaha and the adjacent municipalities, their relative location, their physical peculiarities, their business and social relations, their growth into virtually one community, their inevitable merger into one municipality.

It is a matter of common knowledge that the rapid growth of South Omaha in business enterprises and the development of Dundee as a place of residence created an imperative demand on the part of those residing and doing business there for an adequate water supply. As was said by the Connecticut Supreme Court in the case already discussed, "these people needed to be furnished with water quite as much as the people in the city itself."

It is equally evident that there was no safe or adequate supply of water for any of these communities nearer than Florence, and that it was impracticable to supply any of them, other than Florence, except from mains laid through the City of Omaha.

Such supply was so furnished with full knowledge on the part of the authorities and citizens of Omaha and without objection from anyone. What was done was done with more reason, because under greater necessity, than in the Duluth case. It is too clear for argument that, so long as the Missouri river runs, and a supply and a distribution system adequate for the supply of these adjacent communities as well as Omaha are possible, the supply must be maintained. No court would ever cut it off or allow it to be severed, whatever the ownership of the water works system.

Nor can it be held to be to the disadvantage of the City of Omaha to own and operate the por-

tions of the distribution system lying within these adjacent municipalities. The city claims in its answer in this suit that the valuation placed on these portions in the appraisement is less than their true value, and the evidence in the case is to the effect that the operation of those portions would be highly profitable to the city.

It must be considered that when the act of 1903 was passed, it was passed with full knowledge on the part of the members of the legislature of the notorious facts of the water works situation at Omaha, and of the probable merger, at no very distant date, of the municipalities closely grouped there.

The Court should therefore conclude that when the legislature by that act expressly authorized the City of Omaha to purchase "a system of water works" and expressly conferred on the water board authority and powers to extend ten miles from the corporate limits of the city, the legislature, with a view to the future, contemplated the acquisition and operation by the city of precisely the system of water works then owned and operated by the Omaha Water Company.

The Court should further consider that when the act of 1905 was passed, it was passed with full knowledge on the part of the members of the legislature of the notorious facts that the mayor and city council of Omaha had, by an unrepealed ordinance, elected, under the alternative mandate of the Act of 1903, that the city purchase "the system of water works operated by the Omaha Water Company," and that such system was then under appraisement for the purpose of determining the price. The Court should therefore conclude that, when the legislature, in the act of 1905.

expressly authorized the water board, already vested by section 10 of the act of 1903 with the "general charge, supervision and control of the design, construction, operation, maintenance and extension or improvement of any water plant owned or operated by such city," and with jurisdiction for those purposes ten miles beyond the corporate limits of the city, to contract with any adjacent municipality to supply such municipality with water for domestic, mechanical, public or fire purposes, it did so in order to clothe thus specifically the water board, as the agency which was to succeed the city council, with the fullest authority to operate everywhere the system of water works which the city was preparing to take over and operate upon completion of the purchase it had elected to make.

It should be noted that at the same session, the legislature passed an act authorizing the merger of these adjacent municipalities with the City of Omaha (Laws of 1905, Ch. 14, Sec. 2).

Neither the city council nor the water board had meanwhile attempted to withdraw or modify in any particular the ordinance of election to purchase the entire system of water works operated by the water company.

Therefore, the only objection ever made to the complete purchase authorized in terms both broad and specific by repeated legislative enactments, and agreed upon by the City of Omaha and the Omaha Water Company, through definite, unambiguous action of the city council and the company's board of directors, placing the same construction upon the provision for purchase in the original ordinance, is the objection raised by counsel representing the city, and adopted in this suit

by the water board as a means of defeating the appraisalment.

In order to sustain such defense to this suit, counsel for the city are compelled to insist that the act of 1905 controls the purchase elected to be made by the city in 1903, and to contend for a construction of that act which is contrary to equity and reason. Either the act of 1905, in respect to contracts by the water board with adjacent municipalities, was intended to be an enabling act, for the purpose of placing beyond question the authority of the water board with respect to operation, or it was framed ambiguously with a dishonest purpose. Had the appraisalment been satisfactory in amount to the water board, there can be no doubt that it would have regarded the act as an enabling act. If the construction now contended for by the counsel employed by the water board—that by this act the power of the City of Omaha is restricted to “a contract to *deliver water* to a water works system in an adjacent municipality”—be upheld, it must lead to the inequitable result that the City of Omaha can, on payment of a materially reduced price, limit the comprehensive purchase it has clearly elected to make, to such portion of the system as will enable it to supply water to adjacent municipalities, or to the water company, at a maximum price, without responsibility or expense for the maintenance of the distribution system and the hydrants within the limits of those municipalities.

It is inconceivable that a court of equity can countenance such a scheme for defeating the will of the citizens of Omaha, discriminating unjustly against the inhabitants of adjacent communities, and defrauding the water company.

Therefore, on all grounds, there is the clearest warrant for the court to hold that the City of Omaha has ample statutory power to acquire, own and operate the system of water works now owned and operated by the Omaha Water Company, and which the mayor and city council have elected and determined to purchase.

POINT XI.

Upon the exercise of the option the obligation of the defendant to complete the purchase became absolute.

1. It appearing that the City of Omaha, with ample legislative authority, has duly exercised, through the ordinance of election, its right to purchase the system of water works operated by the Omaha Water Company; and the price to be paid having been duly ascertained through an appraisement, as provided in the ordinance of 1880, the city is legally bound to complete the purchase through payment of the price thus determined.

The nature of such an option and the effect of its exercise are conclusively set forth by the Circuit Court of Appeals for the Eighth Circuit in *Castle Creek Water Co. v. City of Aspen*, 146 Fed., 8, as follows:

“The stipulation regarding the sale of the works was an incidental part of the main agreement, and that agreement did not constitute a contract of sale of the water works.

Nevertheless, the agreement of the company that the city should have the option to purchase them at an appraised value was an inseparable part of this original contract. It was a continuing and irrevocable offer of the water company to sell. The notice given by the city that it would purchase upon the terms specified in this offer was an exercise of its option, and an irrevocable acceptance of the water company's offer. The city had but one option. When it had exercised it, its power to choose was exhausted. An election once made estops the elector. He may not revoke his choice and select another alternative. *The irrevocable offer and the irrevocable acceptance attested the meeting of the minds of the parties and constituted a contract of sale of the waterworks*" (p. 10).

The court cited the case of *Cherryvale Water Co. v. City of Cherryvale*, 65 Kan., 219; 69 Pac., 176, where, in passing upon the effect of the exercise of a similar option by the city, the court said:

"When the city elected, by giving the notice, a binding contract of purchase was consummated" (p. 230).

The court in that case further held that the city was bound to complete the purchase in spite of a material change in the condition of the water works pending their appraisement.

The court also cited the case of *Braintree Water Supply Co. v. Braintree*, 146 Mass., 482.

That was a case where the statute granting a franchise to the water company contained a provision for an option of purchase by the Town of Braintree, similar to that contained in Ordinance 423 of the City of Omaha. One of the terms of

that provision was that the option might be exercised by a vote of the town. Having once voted to purchase, the town subsequently assumed to revoke such vote. Thereupon, the company brought suit for the appointment of commissioners for determination of the price and completion of the contract of purchase.

This petition, denied in the court of first instance, was granted by the Supreme Court of Massachusetts, which held:

"The legislature conferred upon the company the corporate franchise, with a condition annexed in favor of the town. By accepting its charter, the corporation impliedly agreed to sell, whenever the town by vote should decide to buy. The legal relation of the parties was as if the corporation had made in writing a continuing offer to sell, at a price to be subsequently agreed upon by the parties, and in default of agreement to be fixed by commissioners. The vote of the town to buy was an acceptance of the offer, which completed the contract. The rights of the parties were then the same as if both had signed an executory contract, binding one to sell and the other to buy, at a price to be agreed between them, or determined under the statute. Neither party could then defeat the right of the other to have the contract executed. By the terms of the statute, it was to be specifically performed" (p. 486).

In the *City of Fayetteville v. Fayetteville Water, Light & Power Co.*, 135 Fed., 400, a similar view of the exercise of such an option was held. In that case the city had the right, at its option, to buy the company's plant at the end of ten years, with provision for the appointment by each party

of an appraiser who, with another selected by them, should fix the value of the property. The city in apt time and in due form, gave notice of its exercise of the option, and appraisers were appointed accordingly.

Upon objection to the appraiser appointed by the company, he retired and named a substitute who, with the other appraisers, agreed upon a valuation. The contention of the company in the suit by the city for specific performance, that the appraiser first appointed had no power of substitution was overruled, and a decree of specific performance was granted.

In the course of its opinion, the court said:

“Upon the exercise of this option the contract became, *eo instanti*, executed, and the sale was perfected” (p. 404).

2. It is begging the question for counsel for the City of Omaha to argue that the city has no power to purchase so much of the company's system of water works as lies in the adjacent municipalities, on the ground that the city has no power to levy taxes or issue bonds for such purchase. For, if the city has ample statutory power to purchase so much of the system of water works as lies in these neighboring municipalities, it has the same authority to levy taxes and issue bonds to pay therefor as it has to pay for what lies within the city limits.

Ralls County Court v. United States,
105 U. S. 733, 735, 736.

If the power to levy taxes and issue bonds be limited to the water works located wholly within the City of Omaha, and which are shown by the

record to compromise a complete pumping station with settling basins and a storage reservoir, it is difficult to perceive upon what consistent theory counsel for the city can claim that it has authority to levy taxes and issue bonds to pay for the pumping station at Florence and the supply main from that city to Omaha.

The question is not divisible on any reasonable theory, but is fundamentally and decisively a question of statutory authority to purchase, which has been fully demonstrated to have existed when the election to purchase was made.

3. The averment in the answer that, through the failure of the complainant to appoint an engineer to act as appraiser for a new appraisement at the instance of the water board, the company has now forfeited its right to insist upon a performance by the city of its election to purchase, states no ground of defense.

If the first appraisement is valid and binding upon the City of Omaha, any steps taken by the city in the direction of a second appraisement are, of course, immaterial and futile.

If the first appraisement was invalid and not binding upon the petitioner, judgment would necessarily go against the respondent, irrespective of any proceedings subsequent to the first appraisement.

Manifestly the provisions of the act of 1905 giving in terms to the water board "the acceptance or rejection of any award resulting from any such appraisement" could not, so far as this particular appraisement is concerned, clothe that body with a power which it did not possess when the election to purchase was made. Nor can ful-

filment of the contract of purchase, which became complete through that election, be prevented, or the obligation thus created be in any degree impaired, through any provisions of the act of 1905.

The language of the court in *Sala v. The City of New Orleans*, 2 Woods 188, may be taken as an appropriate comment upon such legislation:

"It seems to me clear, that after the thirty-five years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the water works, an act of the legislature forbidding the issue of the bonds, or imposing onerous conditions upon their issue, not in force at the date of the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank. As soon as the city made its election to purchase, the right of the bank to sell the water works became absolute. The state had agreed that under such circumstances the city should have power to purchase, and should purchase, and the bank should be compelled to sell, and should, in fact, have the right to sell, and should receive city bonds in payment, which bonds the city was authorized to issue. Any legislation which interfered with these powers and obligations, or any material terms thereof, the state was incompetent to pass" (pp. 194, 195).

POINT XII.

Through action taken by the water board of the City of Omaha since the record in this case was made up, and by the voters of the city, with respect to the acquisition of the water works in question, the pending proceeding for a review of the judgment below has ceased to have any legitimate merit or excuse.

1. Of such action it is submitted that this Court should take judicial notice within well established rules.

Thus, in *Equitable Life Assurance Society v. Brown*, 213 U. S., 25, this Court, in reviewing on certiorari a decision on a demurrer, held that, where a court of equity has jurisdiction of a case in which the defendant is in its nature a public institution, it is "proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant," and that, although certain facts so considered by this Court had happened since the filing of the bill, it was "not improper to refer to them, as they only constitute a history of the defendant since that time" (pp. 41, 42).

In *Wilson v. Shaw*, 204 U. S. 24, in a suit in which one purpose of the bill was to restrain the Secretary of the Treasury from paying specific sums named therein to the Panama Canal Company and to the Republic of Panama, this Court

had said that it would be sufficient to note the fact, of which the Court might take judicial notice, that those payments had been made.

In *Mills v. Green*, 159 U. S. 651, a suit in which a right to vote at the election of delegates to a constitutional convention was involved, this Court took judicial notice of the fact that, at the time the appeal was brought, the election had been held, and so dismissed the appeal.

In *Geist v. Detroit City Railway*, 91 Mich. 446, a personal injury case in which plaintiffs counsel in his address to the jury referred to the defendant as "driven through the street by the mob," the Supreme Court, on appeal, reversed a judgment for the plaintiff upon the ground that such remark of his counsel might well have had a very prejudicial effect upon the jury against the defendant, especially "in view of the great excitement and anger of the populace, which culminated in mob violence against this railway company but a few weeks before the trial, of which," said the court, "we cannot fail to take judicial notice as a matter of current history."

In *Sun Publishing Association v. The Mayor*, 8 App. Div., 230, the court took judicial notice of the difficulty experienced in raising private capital to build elevated railways in the City of New York, saying: "The court must take judicial notice of the city's history in this regard."

See also:

Wigg v. The Erie Railroad Company, 174 Fed. Rep., 401.

Connett v. United Hatters of North America, 74 Atl., 188.

Wigmore on Evidence, Vol. IV., sec. 2565.

The Supreme Court of Nebraska has adopted a liberal rule regarding judicial notice in *Foley v. The State*, 42 Neb., 233, where judicial notice was taken of a municipal ordinance, although it had not been pleaded, saying:

“We feel at liberty to adopt the rule most in harmony with the spirit of our liberal laws and most promotive of a prompt and efficient enforcement of municipal laws. The reason for the strict rule of the common law which requires every by-law, ordinance or private statute to be specially pleaded, cannot be said to exist under our system.”

2. Obviously action by the Omaha Water Board, embodied in a formal order, resolution or a declaration, falls within the same category as an ordinance of the City Council.

Such an order was adopted on the seventh day of April, 1909, and promulgated as follows:

“ORDER NO. 14.

It is hereby ordered and directed by the water board of the City of Omaha:

SEC. 1. That at the regular city election of the City of Omaha, to be held on the 4th day of May, 1909, the question and proposition of issuing bonds in the sum of six million five hundred thousand (\$6,500,000) dollars to be known as the Omaha Water Works bonds, the proceeds of which, in whole or in part as may be necessary, to be used for the purpose of the purchase and extension of the water works, or any part thereof, belonging to the Omaha Water Works Company, shall be and is hereby authorized and ordered to be submitted to the electors of said city at the said election.

The said bonds shall be of the denomination of one thousand (\$1,000.00) dollars each, with interest coupons thereto attached, and known as Omaha Water bonds to bear interest at the rate of four (4) per cent. per annum, payable in thirty years from the date of their execution, with interest payable at Kountze Bros., bankers, New York City, semi-annually, on the first days of January and July of each year.

Sec. 2. That the question and proposition shall be submitted in the following form:

'Shall the City of Omaha issue six millions five hundred thousand (\$6,500,000) dollars of four (4) per cent. coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the city with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the water board of the City of Omaha, may be made for such purpose.'

Sec. 3. The mayor of the City of Omaha is hereby authorized and directed to issue a proclamation setting forth in full said question and proposition in accordance with the law, at least twenty (20) days prior to the date of said election, which said proclamation shall be published in the official newspaper of the said city twenty (20) days prior to the date of said election.

Sec. 4. The city clerk of the City of Omaha is hereby authorized and directed to prepare sample and official ballots in accordance with the above and foregoing order and to distribute same according to law to each of the said voting precincts in the City of Omaha at the said election.

The above described question and proposition shall be printed upon said ballots and thereunder shall be printed in separate lines the words, 'Yes,' 'No,' and following each of said words upon the same line therewith shall

be printed a square wherein the electors shall vote upon said question and proposition by making a cross. A cross placed in the square following the word 'Yes' shall be a vote in favor of said question and proposition, and a cross placed in the square following the word 'No' shall be a vote against said question and proposition; provided, however, that if voting machines shall be used at said election, the city clerk shall not print the official ballots, but shall prepare the statement of the question and proposition submitted to be inserted on the ballot label for questions on said voting machines with words 'Yes' and 'No' for the voter, and it shall be sufficient to print on said ballot label the following—'Shall the city issue \$6,500,000 of water bonds running thirty years at 4 per cent?'

Sec. 5. For the payment of the principal and interest of said Omaha Water Works bonds the full faith, credit, property and revenues of the City of Omaha shall be and are hereby pledged."

MILTON T. BARLOW,
Chairman of Water Board.

ARNOLD C. KOENIG,
Secretary of Water Board.

I hereby certify that this is a true copy of Water Board Order No. 14.

ARNOLD C. KOENIG,
Secretary.

This was duly followed by the election proclamation by the mayor, as required by the order.

The proclamation was followed by an appeal to the people of Omaha, signed by all the members of the water board and published in the newspapers of the city in April and May, 1909, urging the people to vote for the water bonds and giving the reasons of the water board for so urging, as follows:

“WATER BONDS

WHY THEY SHOULD CARRY.

TO THE PEOPLE OF OMAHA:

Many questions are being asked in regard to the proposition to vote \$6,500,000 of water bonds of the city.

We deem it proper that the public should know the reasons why we urge the people of Omaha to vote for the water bonds:

First.—We believe municipal ownership to be the best solution of the situation; that it will result in better water service, more prompt extension of water mains and in reduction of water rates without increasing taxes. There can be no municipal ownership without voting bonds.

Second.—We believe the plant will sustain itself—paying interest on bonds, cost of operation, and create a sinking fund to pay off the bonds without additional taxes.

IN OTHER WORDS, WE BELIEVE WE WILL BE BUYING A REVENUE PRODUCING PROPERTY WHICH WILL CARRY ITSELF.

Third.—We cannot and will not use the \$3,000,000 of bonds heretofore voted.

Fourth.—It is important that the bonds be voted now that the water board may be in position to make immediate compromise of the litigation, if this is possible.

Fifth.—If immediate compromise cannot be made, it is equally important that the bonds be voted, that the water board be in position to pay the amount found due by the United States Supreme Court.

Sixth.—We do not intend to nor will we pay the amount of the award (\$6,263,000) unless compelled to do so by the decree of the Supreme Court, where the matter is now pending.

Seventh.—We will not compromise unless upon a substantial reduction of the amount as found by the award. We will try to compromise the matter immediately if the bonds are voted.

Eighth.—We are not in position to make any compromise until the issue of bonds shall be authorized by vote of the people. In previous attempts to compromise we have been met with the statement that we were in no shape to carry out our proposition until bonds were voted.

Ninth.—We do not believe in granting a franchise to the water company, nor to any Omaha syndicate. If it is a good proposition for a syndicate to take hold of, it is a better thing for the city to handle for its own people.

Tenth.—If the bonds are voted, they will not be issued, nor will they bear interest, until the water works are acquired by the city.

Eleventh.—No more of said bonds will in any case be issued than are actually necessary for the acquisition of the plant.

Twelfth.—Should the decision of the supreme court be against the city, a decree will be entered which must be paid. The city cannot avoid the payment of such judgment by refusing to vote bonds. The judgment would be enforced by a levy of taxes on the property of the citizens. If the bonds are voted, the judgment can be paid by the proceeds of the bonds, and the interest and expense of running the water works will be paid out of the revenues derived from the sale of water, without additional taxes on the property of the city.

THIRTEENTH.—IT MUST BE REMEMBERED THAT THE VALUATION, \$6,263,000, INCLUDES THE WHOLE PLANT OF THE WATER COMPANY IN THE CITY OF OMAHA, SOUTH OMAHA, FLORENCE AND DUNDEE, AND NOT MERELY THE PORTION PERTAINING TO THE CITY OF OMAHA. THE BONDS FOR \$3,000,000, HERETOFORE VOTED, CONCERNED ALONE THE PORTION OF THE PLANT IN THE CITY OF OMAHA AND THE PUMPING STATION IN FLORENCE.

Fourteenth.—The voting of these bonds will defeat the effort of the Omaha Water Company and the Omaha syndicate to secure

a franchise, and will secure municipal ownership for the people at the earliest date possible.

These are a few of the reasons why we unanimously urge the voting of these bonds.

We have given the matter our best consideration and believe good business judgment dictates the approval of the bonds.

MILTON B. BARLOW,
ISAAC E. CONGDON,
A. H. HIPPLE,
R. B. HOWELL,
CHARLES R. SHERMAN,
D. J. O'BRIEN.

The Omaha Water Board."

This appeal is a part of the current city history since the record in this case was made up.

At the regular annual city election held May 4, 1909, the proposition to issue the water works bonds to the amount of \$6,500,000 for the purchase of the system of water works operated by the Omaha Water Company, was carried by 9848 votes in favor of the issue against 4137 votes in opposition to the issue, as appears from the record of the City Council, Journal A-75, p. 5, as follows:

"COUNCIL CHAMBER.

May 10, 1909.

1690.

REPORT OF CANVASSERS:

We, the undersigned, Dan B. Butler, City Clerk, and Otto J. Bauman and Arthur B. Grotte, two disinterested electors of the City of Omaha, appointed by the Council to canvass the returns of the votes cast at the election held on Tuesday, May 4, 1909, for the questions submitted to the vote of the people:

'Shall the City of Omaha issue Six million Five Hundred Thousand (\$6,500,000.) Dollars, four (4) per cent. coupon semi-an-

nual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?' * * *

FOR QUESTION AND PROPOSITION OF ISSUING OMAHA WATER WORKS BONDS: Shall the city of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars, four (4) per cent. Coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

Yes. 9848

No. 4137

All of which is respectfully submitted.

DAN B. BUTLER,	}	Canvassers.
City Clerk		
OTTO J. BAUMAN,		
A. B. GROTE,		

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser. 3

FROM L. B. JOHNSON, PRESIDENT CITY COUNCIL.

As president of the City Council of the City of Omaha, I hereby declare that the fol-

a franchise, and will secure municipal ownership for the people at the earliest date possible.

These are a few of the reasons why we unanimously urge the voting of these bonds.

We have given the matter our best consideration and believe good business judgment dictates the approval of the bonds.

MILTON B. BARLOW,
ISAAC E. CONGDON,
A. H. HIPPLE,
R. B. HOWELL,
CHARLES R. SHERMAN,
D. J. O'BRIEN.

The Omaha Water Board."

This appeal is a part of the current city history since the record in this case was made up.

At the regular annual city election held May 4, 1909, the proposition to issue the water works bonds to the amount of \$6,500,000 for the purchase of the system of water works operated by the Omaha Water Company, was carried by 9848 votes in favor of the issue against 4137 votes in opposition to the issue, as appears from the record of the City Council, Journal A-75, p. 5, as follows:

"COUNCIL CHAMBER.

May 10, 1909.

1690.

REPORT OF CANVASSERS:

We, the undersigned, Dan B. Butler, City Clerk, and Otto J. Bauman and Arthur B. Grotte, two disinterested electors of the City of Omaha, appointed by the Council to canvass the returns of the votes cast at the election held on Tuesday, May 4, 1909, for the questions submitted to the vote of the people:

'Shall the City of Omaha issue Six million Five Hundred Thousand (\$6,500,000.) Dollars, four (4) per cent. coupon semi-an-

nual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose? . . .

FOR QUESTION AND PROPOSITION OF ISSUING OMAHA WATER WORKS BONDS: Shall the city of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars, four (4) per cent. Coupon semi-annual interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

Yes. 9848

No. 4137

All of which is respectfully submitted.

DAN B. BUTLER,	} Canvassers.
City Clerk	
OTTO J. BAUMAN,	
A. B. GROTE,	

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser. 3

FROM L. B. JOHNSON, PRESIDENT CITY COUNCIL.

As president of the City Council of the City of Omaha, I hereby declare that the fol-

lowing question and proposition regarding the issue of Water Works Bonds in the sum of \$6,500,000.00 has been duly carried, to-wit:

'Shall the City of Omaha issue Six Million Five Hundred Thousand (\$6,500,000) Dollars four (4) per cent. Coupon semi-annuals interest bonds, payable in thirty (30) years from the date of said issue for the acquisition of a water plant to supply the City with water for domestic, mechanical, public and fire purposes, or so much of said bonds as in the judgment of the Water Board of the City of Omaha, may be needed for such purpose?

And I declare that the issuance of said bonds has been authorized by the required majority vote of the legal electors of the City of Omaha.

Omaha, Nebraska, May 10, 1909.

Motion by Mr. Zimman, that the report be adopted.

Carried: The report was adopted.

Yeas: Bridges, Brucker, Elsasser, Hansen, Jackson, McGovern, Sheldon, Zimman, Mr. President. 9

Nays: 0

Absent: Davis, Endres, Funkhauser, 3

On motion by Mr. Elsasser, the Council adjourned.

DAN B. BUTLER,
City Clerk."

The result of the vote was duly certified to the water board, as appears from the minutes of a meeting held June 14, 1909, as follows:

"The Secretary presented a certified copy of that portion of the report of the Committee (consisting of the City Clerk and two disinterested electors) of the City of Omaha appointed by the council to canvass the returns of the votes cast at the election held on Tues-

day May 4th, 1909, for the various bond propositions submitted to the vote of the people, which relates to the canvass of the votes on the question of issuing \$6,500,000 Omaha Water Works bonds. Said abstract from said general report is certified to by the City Clerk and shows the following result:

'Yes=9849 votes.

'No=4137 “

5711 votes majority in favor of bonds.

ARNOLD C. KOENIG,
Secretary.

Approved July 7, 1909.”

The circumstances of this vote are all matters of which this Court can take judicial notice.

The provisions of the Nebraska statutes with regard to the issue of water bonds are set forth in the appendix to this brief.

The respondent files with the clerk of this court verified copies of the order, proclamation, appeal, and record of the return of the canvassers.

From all this certain things are clear.

Foremost, it appears that the assignments of error to the effect that the Circuit Court of Appeals erred in holding that the election to purchase included all the properties of the water works system, and in holding that the City of Omaha had corporate authority to purchase that part of the system extended into adjacent municipalities (Petition for certiorari, pp. 8 and 9), were not declared in good faith for the purpose of either relieving the city of an unauthorized purchase or limiting the scope of the purchase.

As already pointed out, there has never been any official withdrawal from the election to purchase the system as an entirety, nor any official

declaration that the scope of the purchase was intended to be limited to that part of the water works used only for supplying the City of Omaha; but now we find the water board urging the issue of bonds for the purchase of "the whole plant of the water company in the City of Omaha, South Omaha, Florence and Dundee, and not merely the portion pertaining to the City of Omaha."

Therefore, it is manifest that these assignments of error have been injected into the case by counsel for the city as chance grounds of reversal, doubtless with a view, in case of reversal, to another enabling act of the Nebraska legislature, after a "compromise," or to the possibility of a construction by the Supreme Court of Nebraska favorable to the present existence of ample statutory authority for the full purchase.

It also appears that more than two-thirds of the voters of the city interested in the question were not only in favor of the purchase of the entire system, but were willing to vote bonds enough to pay the price fixed by the appraisement.

It follows, and is virtually avowed by the water board, that the sole purpose of continuing the effort of the city toward a review of the decision of the Circuit Court of Appeals, is to obtain, if possible, a reversal on technicalities, and thus get a chance of forcing the water company to accept "a substantial reduction of the amount as found by the award." This purpose continues, notwithstanding the public announcement by all the members of the water board, over their own signatures that at the price fixed by the appraisement, they "believe the plant will sustain itself—paying interest on bonds, cost of operation, and create a sinking fund to pay off the bonds with-

out additional taxes;" that "in other words" they believe the city "will be buying a revenue producing property which will carry itself."

The appeal to the voters goes on to declare that it "is important that the bonds be voted, that the water board be in a position to pay the amount found due by the United States Supreme Court"—as if a question of valuation were before this Court. Certainly that appeal conveys the impression, and evidently was meant to convey the impression, that the City of Omaha looks to this Court for a reduction of the price of the water works fixed by the appraisalment. But the question of the value of the water works system is not before this Court through any assignment of error or in any other possible way. Neither in the present case nor in the appraisalment proceedings was any testimony respecting values given by either side on which a court could base even an opinion. Nor is there any evidence whatever of any excess in the valuation found by the appraisers.

Even if there were a question of value in the case, it would afford no ground of reversal, upon the facts surrounding this appraisal. For, as said in *N. E. Trust Co. v. Abbott*, 162 Mass., 148,

"It is well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced."

There remains then to counsel for the city the forlorn hope of a reversal, either upon insincere

assignments of error below in holding that the city has statutory authority to make a purchase which it has unequivocally elected to make and which its water board declares to be advisable and which its voters have provided the means to complete, or upon mere technicalities, neither of which is claimed to have worked in any degree whatever to the city's prejudice. It is impossible to conceive that this Court will overthrow, upon such technicalities, an appraisalment by engineers of high eminence and unquestionable probity, who are shown not to have failed in any respect to make a fair valuation, but who have made a valuation at which, in the opinion of the water board, the city "will be buying a revenue producing property" and who, by the unanimous opinion of the court below, are held to have administered in every way substantial justice.

POINT XIII.

No valid equitable considerations have been suggested why a decree of specific performance should not be entered as directed by the Circuit Court of Appeals.

Whether or not the objections to such decree interposed by counsel for the city, apart from any assignments of error, will be considered by this Court, they suggest no substantial reasons why the decree of the Circuit Court of Appeals should not be affirmed.

1. From the nature of the case, the revision of the inventory of materials on hand, in accordance

with the report of the appraisers, is not only proper but necessary to a final adjustment in connection with any questions of additions, improvements, interest and accounting that may arise when the court comes to enter its final decree.

As said in the opinion of the Circuit Court of Appeals,

“What the parties cannot agree upon, the trial court has full power to determine according to principles of right and justice.” (162 Fed. R., p. 241).

2. The deed tendered, which conveys the contract rights of the water company with respect to supplying water to the communities adjacent to the City of Omaha, properly makes the conveyance subject to the contract obligations of the water company.

Under the circumstances of this purchase, no covenants of warranty can be required, nor are they needed any more than in a case of acquisition of property through condemnation.

The two mortgages of the water company form no obstacle to the complete acquisition of the water works by the city, and, upon completion of the purchase through payment of the purchase price, necessarily cease to be a lien upon the property. They cover in terms no more than the city has in terms elected to purchase. If, therefore, the decree below be affirmed, the rights of the bondholders in respect to the outlying properties are subject to the election of the City of Omaha to purchase those properties.

The statement in the brief of counsel for the city (p. 72) that “if the Court should enter a decree as prayed, the city would pay to the water company \$6,263,295.49, and would obtain nothing therefor but an *equity* in the property of *no value*,

because the mortgage obligation exceeds the purchase price," has no foundation either in law or in fact.

As matter of law, the underlying right of purchase reserved to the city in the original ordinance of 1880, necessarily insured to the city complete title to the water works upon exercise of the option and payment of the purchase price. Otherwise, this reserved right could have been nullified by mortgaging the property up to its full value.

Not only so, but the two mortgages of the Omaha Water Company expressly recite and recognize the ordinance of 1880, as an underlying source of title, and the bondholders must be held to have taken their bonds subject to the exercise of the reserved right of purchase. (Record, pp. 203, 220).

As matter of fact, the mortgage obligations do not and cannot exceed the purchase price of \$6,263,295.49, because the amount of bonds at any time outstanding under both mortgages cannot exceed \$6,000,000.

Thus, the prior lien mortgage provided for an issue of bonds limited to the aggregate amount of \$1,500,000. Of these, bonds to the amount of \$440,000 could only be issued to take up underlying bonds outstanding to the amount of \$400,000. (Record, pp. 200, 205).

The consolidated mortgage provided for an issue of bonds limited to the aggregate amount of \$6,000,000. Of these, bonds to the amount of \$1,750,000 could be issued only to take up the prior lien bonds to the amount of \$1,500,000. Of the remaining bonds, amounting to \$4,250,000, bonds to the amount of \$3,600,000 were to be issued towards payment for the property and bonds to the amount

of \$650,000 were to be reserved for enlargement and improvement of the property (Record, p. 222).

Thus, under no circumstances, could there be outstanding mortgage bonds of the water company to an amount in excess of \$6,000,000.

Even if the question of title raised by the city were valid, the court could provide for the payment of the outstanding bonds, which are less in amount than the purchase price, out of the proceeds of sale, the bonds being subject to redemption at 105.

As said in *Guild v. Railroad Company*, 57 Kansas, 70:

"Where an incumbrance can be removed merely by the application of the purchase money, and the court is able to provide for the conveyance of a clear title to the vendee, the mere fact that incumbrances exist which the plaintiff has not removed, or even is unable to remove without the application of the purchase money, for that purpose, will not prevent a decree for a specific performance." (p. 77).

A determination of all questions of this description may properly be made by the Circuit Court, facilitated perhaps by the presence in the case of the trustees of the two mortgages, as suggested by the Circuit Court of Appeals.

3. The answer admits that a deed was tendered, as set forth in the record, purporting to convey all of the system of the water works of the complainant company, including the parts thereof located within the municipalities adjacent to the city of Omaha. While the answer avers that the defendant has no knowledge upon which to base a

belief as to whether the deed was good and sufficient, or properly executed, or in due form, it does not make any specific exception to the deed, further than to aver that the defendant was without authority to receive or accept of a deed conveying to it the properties lying within or necessary or appurtenant to the supplying of water to South Omaha, Dundee, Florence and the East Omaha Land Company, and that the City of Omaha was without authority in law to pay for said properties, or contract an obligation to pay for the same.

The answer further admits that the city has not paid, but still refuses to pay, the amount of the appraisement.

The evidence in the case, including the deed itself, proves that it was good and sufficient and properly executed, and in due form and properly tendered.

Whether or not that was so, the court can decree a specific performance upon the execution and delivery of such a deed as the court shall approve.

*Kentucky Distilleries & Warehouse
Co. v. Blanton, 149 Fed., 31.*

4. It is too clear for argument that any authority given in terms by the act of 1905, to the water board to reject an award resulting from an appraisement, could not extend to the appraisement which, through the exercise by the city, in 1903, of the option to purchase, became a part of the irrevocable contract thus made.

5. While it is not questioned that a decree of specific performance is not always a matter of ab-

solute right, it is submitted that no court has ever refused such relief in a case where a party is under a plain contract to purchase a property at a price at which the purchaser avers that it "will be buying a revenue producing property which will carry itself" and "create a sinking fund to pay off the bonds" to be issued therefor.

6. The suggestion of counsel for the city that a judgment be entered setting aside the appraisal and remanding the case to the Circuit Court to proceed in a judicial manner to ascertain the value of the water works, could not in any view of this case be entertained.

The city's right to purchase under the ordinance of 1880 provided explicitly that the purchase price should be ascertained through an appraisal by selected engineers, and no court can make a new contract for the parties or substitute any other method of appraisal, except upon deliberate repudiation of that method by the parties themselves. The case of *Castle Creek Water Company v. City of Aspen*, 146 Fed., 8, goes no further than to hold that specific performance of an absolute contract of purchase cannot be defeated by the refusal of one of the parties to join in the appointment of appraisers.

POINT XIV.

The appraisement being in all respects valid and the city's contract to complete the purchase being absolute, the judgment of the Circuit Court of Appeals should be affirmed with costs.

HOWARD MANSFIELD,
R. S. HALL,
HERBERT C. LAKIN,
Of Counsel for Respondent.

HOWARD MANSFIELD,
Solicitor for Respondent.

Appendix.

The following portions of Statutes of the State of Nebraska cited in the foregoing brief are printed under the Rule.

ACT OF 1879.

“An Act Entitled ‘An Act to amend Section Fifteen (15) of an Act entitled “An Act to incorporate cities of the First Class”,’ approved March 28, 1873 (General Laws of 1879, p. 95).

“Be it enacted by the Legislature of the State of Nebraska:

“That Section fifteen (15) Chapter eight (8) of the general statutes of Nebraska, entitled ‘An Act to incorporate cities of the first class’, approved March 28, 1873, be amended so as to read as follows:

“Section 15. The mayor and council of each city created or governed by this act shall have the care, management and control of the city and its property and finances, and shall have power to pass any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power: * * *

“28th. To erect construct and maintain water works, either within or without the corporate limits of the city, and to make all needful rules and regulations concerning the use of water supplied by such water-works, and to do all acts necessary for the construction, completion, management and control of the same * * * and the mayor and council of each city created or governed by said

act shall have power to contract with and to procure individuals or incorporations to construct and maintain water-works on such terms and under such regulations as may be agreed on" (p. 99).

CHARTER OF OMAHA PRIOR TO LEGISLATION OF 1903.

Chapter 12-a, Nebraska Compiled Statutes, 1901.

"Sec. 27. The mayor and council shall have power to provide for keeping the sidewalks clean and free from obstructions and accumulations and may provide for the assessment and collections of taxes on real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalk adjacent to such real estate clean and free from obstructions and accumulations, as herein provided. To provide for the planting and protection of shade or ornamental and useful trees, and for the protection of birds, their nests and eggs. To provide for, regulate and require the numbering and renumbering of houses along public streets or avenues; to care for and control, to name and rename streets, avenues, parks and squares within the city, to provide for the opening, vacating, widening and narrowing of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law. *Provided*, That no street or avenue shall be narrowed to a width of less than sixty-six feet, except on petition of two-thirds of the owners of the lots and real estate along that portion of the street or avenue narrowed. To appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, elec-

tric light plants or water works, including mains, pipe lines, and settling basins therefor, the right and power to appropriate private property for sewers, parks, parkways, boulevards, electric light plants and water works, to extend for a distance of ten miles from the corporate limits of the city; they shall also have power to appropriate any water works system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises to own and operate the same, if any. All cities of the metropolitan class, upon condemning private property under such authority, shall cause to be recorded an accurate plat and a clear, definite description of the property so taken in the office of the register of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken."

"Sec. 101-b. In each city of the metropolitan class there shall be a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and council a system of public parks, parkways

and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or ground so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated or purchased or hereinafter provided, assess such real estate as may be specially benefited by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways or boulevards, notwithstanding said limits include lands, lots or grounds within the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise; and for the purpose of paying for and improving land, lots or grounds purchased or appropriated for parks, parkways or boulevards, the mayor and council may issue bonds

for such purpose to an amount necessary, not to exceed fifty thousand (\$50,000) dollars per year, said bonds to be designated and known as "Park Bonds, Series * * *," and to be issued and used in accordance with the provisions governing the issuance of sewer, funding, and other public improvements bonds by this act contemplated. Provided, no such bonds shall be issued until the question of the issuing of the same has been submitted to the electors of the city at a general or special election therein, and authorized by a vote of two-thirds ($2/3$) of the electors voting on said question at such election. When improvements are made upon or in streets, or sidewalks adjacent to, and abutting upon, parks, parkways or boulevards and similar grounds in the charge control of said park commissioners, the cost or expense of which would otherwise be chargeable to the city, the same shall be paid from the park fund tax herein provided; and said commissioners are hereby directed to pay the cost of such improvements. Said board of park commissioners shall be composed of five members, who shall be resident freeholders of such city, and who shall be appointed by the judges of the district court of the judicial district in which such city shall be situated. The members of said board shall be appointed by said judges, a majority of said judges concurring, but the members of said board heretofore appointed and now acting shall hold their office for the full time for which they were appointed under the law heretofore enforced, and vacancies occurring from expiration of their term shall be filled by further appointments by said judges for the term of five years; it shall be the duty of said judges, a majority concurring, to ap-

point or reappoint, one of said board each year on the second Tuesday of May, and to fill for the unexpired term any vacancies existing in the board. A majority of all the members of the board of park commissioners shall constitute a quorum. It shall be the duty of said board of park commissioners to lay out, improve and beautify all lands, lots or grounds now owned, or hereafter acquired for parks, parkways or boulevards. They may employ a secretary and such landscape gardeners, superintendents, engineers, keepers, assistants or laborers, that may be necessary for the proper care and maintenance of such park, parkways or boulevards, or the improvements or beautifying thereof, to the extent that funds may be provided for such purpose. The members of said board at its first meeting each year after the first Tuesday in May shall elect one of their own members as chairman of said board. Before entering upon their duties each member of said board shall take an oath to be filed with the city clerk, that he will faithfully perform the duties of his appointment and in the selection or designation of lands, lots or grounds for parks, parkways or boulevards, and in making appointments he will act for the best interests of such city and the public, and will not in any manner be actuated or influenced by personal or political motives. The members of said board shall receive no compensation and serve without cost to the city."

"Sec. 135. The mayor and council shall have power to erect, construct, purchase, maintain and operate subways and conduits, water works, gas works and electric light plants, either within or without the corporate limits of the city, and shall have power to fix, charge and collect a ren-

tal or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen."

LAWS OF NEBRASKA, 1903, CHAPTER 12.

A Bill For

An Act to provide in cities of the metropolitan class, viz.:

1. For the procedure in certain cases, by the mayor and council in the acquisition of a municipal water plant:
2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees.

3. Penalties for interference with water plant, or employees of water board in the discharge of their duties:

4. For a Water Fund, its revenues, and the disbursement and application thereof:

And amending Sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled "An Act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled 'An Act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government.' " approved March 30, 1887, and all acts amendatory thereof, being Chapter 12a of the Seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled 'Cities of the Metropolitan Class,' approved March 15, 1897, being Chapter 12a of the Tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled "The Compiled Statutes of the State of Nebraska, 1881 (Tenth edition), with amendments 1882 to 1901, comprising all the laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, and repealing said original sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE
OF NEBRASKA:

Section 1. (Bonds for Construction or Purchase of Water Plant.) In any city of the met-

ropolitan class which has heretofore voted or may hereafter vote bonds for the construction or purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall within thirty (30) days after the election at which such bonds are or have been voted, or in case such bonds have been heretofore voted, then within thirty (30) days after this act shall take effect, declare by ordinance that it is necessary and expedient for such city to construct or purchase, as the case may be, a system of water works.

Sec. 3. (Method of Purchasing.) In case bonds are or have been heretofore voted for the purchase of a water plant it shall be the duty of the mayor and council, and the mayor and council shall, beginning at the first meeting of the council after the approval of said ordinance, proceed to take the necessary steps to acquire such water plant under the powers granted by the charter of such city, or by virtue of any rights inuring to such city through contract or otherwise; and if at any stage of the proceedings instituted to acquire such water plant, the mayor and council shall, unduly or unreasonably delay, then and in such case, said mayor and council may be compelled to act by mandamus at suit of the water board of such city; and, further, if at any stage of the proceedings it shall be ascertained that the bonds hereafter or heretofore voted for the construction or purchase of said water plant are inadequate in amount, then, it shall be the duty of the mayor and council, and mandatory thereon, to submit to the voters of such city, in the manner prescribed by law, a proposition for the issuance of bonds in such further amount as may be

necessary for the construction or purchase of such water plant, as the case may be.

Sec. 4. (Appraisement.) If the method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve the appointment of one or more appraisers by the council, or by the mayor and council, then, and in such case, it shall be the duty of the mayor and council to at once notify the water board stating the number of appraisers to be appointed. Upon receipt of such notification the water board shall propose for appointment, by the council, or by the mayor and council, as the case may be, at the time of the next regular meeting of said council, the names of as many appraisers as may be indicated in said notification. And it shall be the duty of the council, or the mayor and council, as the case may be, to appoint or reject, at the time of such meeting, the appraiser or appraisers so proposed by said board. In case of rejection of all or any one of the appraisers proposed, as herein provided, it shall be the duty of the water board, at the time of every regular meeting of the council thereafter, to propose another or other appraisers for appointment, and so to continue until the full number of appraisers shall have been appointed by the council, or by the mayor and council, as the case may be. No such appraiser or appraisers shall be appointed by the council, or by the mayor and council, unless such appraiser or appraisers shall have been first proposed by said water board neither shall any appraisement of said water plant be submitted to the people of such city for ratification or rejection unless the same shall have been, also, first approved by said board. If the

method of procedure adopted by the mayor and council for the acquisition of such water plant shall involve, by reason of contract, the appointment of any appraiser or appraisers by the corporation, partnership, or individual or individuals owning such water plant, and the said corporation, partnership, individual or individuals shall, for thirty (30) days after such appointment of an appraiser or appraisers should, under the contract, have been made, fail to appoint such appraiser or appraisers, then in such case, the water board, representing the rights of the city in the premises, shall have authority, and it shall be their duty, to bring appropriate proceedings in the district court of the county in which such city is located to compel the said owner or owners of such water plant to appoint such appraiser, or appraisers, or upon their failure then so to do, to have such appraiser or appraisers appointed in their behalf by the court or judge before whom such action is brought. Such action both in the district court and in the supreme court, if such action shall be taken to the supreme court, on appeal or writ of error, shall take precedence for trial over all other cases on the dockets of such courts and be advanced for hearing as soon as at issue.

Sec. 5. (Election of Water Board.) In each city of the metropolitan class owning and operating a municipal water plant, or which has heretofore voted or may hereafter vote bonds for the construction or purchase of a municipal water plant, there shall be a water board consisting of six (6), two of whom shall be elected at the time of each general state election held in the even

numbered years, one from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first board shall be appointed in such manner and for such terms as hereinafter set forth.

Sec. 6. (Appointment of First Water Board.) The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years, from the first Tuesday after the first Monday of January following the general election held in the even numbered years, next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election held in the even numbered years, next after their appointment. One member for each term herein designated, shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Such appointments shall be made within thirty (30) days after the election at which bonds shall have been voted for the construction or purchase of a municipal water plant, or if such bonds have been heretofore voted, or if such city has heretofore acquired a municipal water plant, then within thirty (30) days after this act shall take effect.

Sec. 10 (Powers of Board.) The water board shall have general charge, supervision, and control of the design, construction, operation, maintenance and extension or improvement of any water plant owned and operated by such city, including the power to purchase and contract for necessary material, labor and supplies, and this power shall not be subject to the approval or action of the mayor and city council; but no new construction or extension of such water plant shall be undertaken, involving the expenditure of more than five hundred dollars (\$500) without the approval of the mayor and council, neither shall any extension or improvement of such water plant be undertaken without the approval of said board; provided, that nothing herein contained shall be construed as prohibiting said board from preparing or providing engineering plans and specifications, for any such proposed construction, extension or improvement, or for the purpose of making any estimates which said board may deem necessary, without such approval. The authority and powers herein conferred upon the water board shall extend as far beyond the corporate limits of said city as said board may deem necessary, not to exceed ten (10) miles.

Sec. 12 (Water Rates and Service Fees).—It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water, and all other receipts of the board from whatever source, shall be received and receipted for by the city treasurer, or by an em-

ployee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. The water board shall have authority to make such rules and regulations for the conduct of the water plant, and the use and measurement of water supplied therefrom as it may deem proper, and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs.

Sec. 14. (Interfering with Plant or Employee).—Any person who shall wilfully interfere with or obstruct an employee of the water board in the discharge of his duties, or who shall wilfully tamper with or injure such water plant, or the pipes connected therewith, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be punished by a fine of not over one hundred dollars (\$100.00), or imprisonment in the county jail not over sixty (60) days, or both such fine and imprisonment in the discretion of the court.

Sec. 18 (Water Fund, Levy, Etc.).—The water fund shall consist of all moneys received on account of the water plant for water service or otherwise, together with a water tax to be levied—in lieu of the “fund for paying water rented for fire purposes and for public use”—by the mayor and council, at the same time, and as in the case of other funds provided for city purposes under the provisions of the charter of such city, the amount of said tax to be certified to the mayor and city council by the water board on or before the second Tuesday in January in each year, and

not to exceed the sum of one hundred thousand dollars (\$100,000), and it shall be mandatory upon the mayor and council to levy the same as above provided. Such fund, together with any interest received thereon, shall be used only for the purpose of paying interest on any water bonds issued by the city, the cost of operation, maintenance and extension or improvement of the water plant, and the salaries and expenses of the water board, its employees and assistants as herein provided. The balance remaining in the water fund at the end of each year shall be placed in a sinking fund, provided for the payment of any outstanding water bonds of such city, or for extraordinary improvements of the water plant.

Sec. 19 (Sections Amended).—That sections 16, 24, 25, 29, 32, 33, 35, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of an act entitled “An act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal an act entitled ‘An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government,’ approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895) entitled ‘Cities of the Metropolitan Class,’ approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901), entitled “The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H.

Wheeler," and certified to by Hiland H. Wheeler, compiler of date July 1, 1901, be and the same are hereby amended to read as follows:

Sec. 135. (Duties of Council.)—The Mayor and council shall have power to erect, construct, purchase, maintain and operate subways or conduits, water works, gas works and electric light plants either within or without the corporate limits of the city, and shall have power to fix, charge and collect a rental or compensation for the use of subways or conduits and of water, gas or electric lights furnished consumers, and to make all needful rules and regulations concerning the use of such subways, conduits, water, gas or electric lights and to do all acts necessary for the construction, completion, management and control of the same, including the appropriation of private property for the public use in the construction and operation of the same, compensation for such appropriation to be made as is provided by this act and the mayor and council of each city created or governed by this act shall have power to provide by ordinance or contract with any competent party for the supplying and furnishing of water, gas or electric light, or electric power to the public or private consumers within such city, and the rates, terms and conditions upon which the same may and shall be supplied and furnished during the period named in the ordinance or contract, as provided in section nineteen. (Water Board Paramount.) Provided, that nothing in this section contained shall be so construed as to interfere with the powers, duties, authority and privileges, conferred and imposed upon the water board as prescribed by law, but in all matters relating to

the purchase, construction, maintenance and management of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

Sec. 20. (Repealing Clause.) That said sections, 16, 24, 25, 29, 32, 33, 67, 72, 86, 87, 89, 93, 94, 100, 101a, 135, 138 and 140 of said act entitled "An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government", and to repeal an act entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," approved March 30, 1887, and all acts amendatory thereof, being chapter 12a of the seventh edition of the Compiled Statutes of the State of Nebraska (edition of 1895), entitled "Cities of the Metropolitan Class," approved March 15, 1897, being chapter 12a of the tenth edition of the Compiled Statutes of the State of Nebraska (edition of 1901) entitled "The Compiled Statutes of the State of Nebraska, 1881 (tenth edition), with amendments 1882 to 1901, comprising all laws of a general nature in force July 1, 1901, published under authority of the legislature by Guy A. Brown and Hiland H. Wheeler", and certified to by Hiland H. Wheeler, Compiler of date July 1, 1901, as heretofore existing be and the same are hereby repealed.

Sec. 22. (Emergency Clause.) Whereas an emergency exists this act shall be of full force and effect from and after its passage and approval.

Approved February 2, 1903.

Nebraska Act of 1905.

A new edition of the Compiled Statutes of Nebraska was issued in 1907, comprising all laws of a general nature in force on July 5, 1907.

Chap. 12a of that edition relates to cities of the metropolitan class, and includes an act of the Legislature of Nebraska passed in 1905, known as "House Roll 384", in effect April 3, 1905, and an act of the Legislature of Nebraska, passed in 1905, known as "House Roll No. 8", in effect March 9, 1905. Sections 1 to 219, inclusive, are from the act of April 3, 1905, and Sections 235 to 248, inclusive, are from the act of March 9, 1905.

Neither act has been amended or repealed since 1905 as to any matter of importance in this suit. Every portion of both acts which is important herein is reproduced verbatim in the 1907 compilation. The compilation of 1907 is in such form as to be much more simple for reference than the acts themselves in the form in which they became laws. Therefore, the compilation of 1907 is used in quoting from the act of 1905 for the purposes of this appeal.

The following sections of said chapter 12a of the compiled statutes of Nebraska, edition of 1907 (being, as above stated, sections of the aforesaid two acts of the Legislature passed in 1905), are printed in accordance with the rule of this court.

"845, Sec. 1. (*Metropolitan cities.*) All cities in the State of Nebraska heretofore incorporated as cities of the metropolitan class and all cities which shall attain a population of one hundred thousand (100,000) inhabitants, or more, shall be governed by the provisions of this act. Whenever any city shall hereafter attain a population

of one hundred thousand (100,000) inhabitants or more, and such fact shall have been ascertained by any national or state census, and shall be so certified to the governor by the mayor of such city, it shall thereupon be the duty of the governor by public proclamation to declare such city to be one of the metropolitan class, and thereupon such city shall be the subject to the provisions of this act.

(Note.—Secs. 1-219. “An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government and to repeal sections 7450 to 7649 inclusive (C. S., ch. 12a, except Secs. 123a, 175-186, 194-212) of Cobby’s Annotated Statutes of Nebraska for the year 1903.” Laws 1905, H. R. 384. In effect April 3, 1905.)

846, Sec. 2. (*Corporate limits.*) The corporate limits of such cities may be fixed and determined by ordinance, but shall be and remain as heretofore until changed or altered in accordance with the provisions of this act or of a general law governing cities and towns. Any city, town or village adjoining any city of the metropolitan class may be annexed or merged with such city of the metropolitan class, whenever a proposition for such merger has been submitted at a general election and approved by a majority of the votes cast on such proposition in each city, town or village. The terms of such propositions shall be fixed by ordinance enacted by the city of the metropolitan class and by the city, town, or village to be annexed.

899, Sec. 54. (*Park commissioners.*) In each city of the metropolitan class there shall be a

board of park commissioners, who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board from time to time to devise, suggest and recommend to the mayor and city council a system of public parks, parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose.

902, Sec. 57. (*Same-Lands.*) It shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds designated by said park board, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated, or purchased, as hereinafter provided, assess such real estate as may be specifically benefitted by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessment. And the mayor and council are further authorized upon the recommendation of said park commissioners and with their concurrence to purchase in the name of said city, lands, lots or grounds within the limits herein designated to be used and improved for parks, parkways, or boulevards, notwithstanding said limits include lands, lots, or grounds within

the corporate boundaries of other cities or villages, and if such lands, lots or grounds are in the limits of other cities or villages, said cities or villages shall cease to have jurisdiction over the said lands, lots or grounds after the said lands, lots or grounds are acquired for parks, parkways or boulevards as aforesaid by gift, purchase, condemnation or otherwise.

997, Sec. 140. (*Eminent domain—Waterworks system.*) The mayor and council shall have power to appropriate private property for the use of the city for streets, alleys, avenues, parks, parkways, boulevards, sewers, public squares, market places, gas works, power plants, electric light plants or water works, including mains, pipe lines and settling basins therefor, the right and power to appropriate private property for such purposes shall extend for a distance of seventy-five miles from the corporate limits of the city. They shall also have power to appropriate any water works system, plant or property already constructed to supply the city and the inhabitants thereof with water, or any part thereof, whether lying or being wholly within said city or in part therein and in part without the city, and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants, basins, reservoirs, and all appurtenances reasonably necessary thereto, and a part of, or connected with, said system, plant or property, and franchises and they shall have power to own and operate the same. Upon condemning private property under such authority, the city clerk shall cause to be recorded an accurate plat, and a clear definite descrip-

tion of the property so taken, in the office of the registers of deeds of the county within which such city is located, within sixty days after the other legal steps for the acquisition of such title shall have been taken.

Compiled Statutes of Nebraska, Annotated, 1907.

Page 254; Chap. 12a.

“1052. Sec 194. (*Bonds.*) All bonds shall be prepared by the comptroller, signed by the mayor and countersigned and registered by the city comptroller before delivery, and it shall be the duty of the city treasurer to promptly report to the comptroller detailed statements of all receipts of money from the proceeds of the sale of bonds and to whom such bonds were sold. All bonds shall express upon their face the purpose for which they were issued, and the proceeds thereof shall not be diverted to other purposes. Each proposition for the issue of bonds required to be submitted at a general or special election must contain but one subject or purpose, and shall specify the maximum amount proposed to be issued and state distinctly the purpose thereof, and a separate vote must be required on each proposition so submitted. No bonds shall be issued for the purpose of paying salaries or the current expenses of the city. No bonds shall be sold for less than par.

1053. Sec. 195. (*Bonds, Purpose of Issue.*) The Mayor and Council are hereby authorized and empowered to issue bonds of the city with interest coupons annexed in such amounts and

for such length of time as they may deem proper, the rate of interest not to exceed five per cent. per annum, except as otherwise provided in this act, (1), for the construction and maintenance of sewers, (2), for the construction of subways or conduits, (3) for the renewal of outstanding bonds of said city, in exchange of outstanding bonds for the purpose of reducing the rate of interest, where bonds of the city permit payment before maturity, or in cases where bonds may be refunded by agreement, (4), *for the construction or purchase of a city hall, auditorium, or other needful buildings for the use of the city*, (5), for the construction of bridges, or for the construction, appropriation *or purchase* of gas works, *water works*, electric light plants, power plants, and lands therefor, or land for public parks, parkways or boulevards, (6) for the purpose of funding, or taking up and making payment of the floating indebtedness and liabilities of the city, but the total outstanding bonds of the city for the last named purpose shall never exceed five hundred thousand dollars (\$500,000).

1054, Sec. 195. (*Bonded Debt, Amount.*) The bonded indebtedness of such city, *exclusive of* district paving bonds, district grading bonds, curbing and guttering bonds, district improvement bonds, public library bonds, renewal bonds, *bonds issued* for the purpose of funding, or taking up and making payment of the floating indebtedness and liabilities of the city, or bonds issued for the erection or purchase of a city hall, auditorium or fire engine houses, or the construction of bridges, or for the construction and maintenance of subways and conduits, or for park purposes or *for*

the purchase, construction or appropriation of gas works, water works, electric light plants or power plants, shall not, at any time, exceed in the aggregate two million, seven hundred and fifty thousand dollars (\$2,750,000.00).

1055, Sec. 197. (*Bonds, Amount, Authorization.*) No bonds shall hereafter be issued in any one year in excess of two hundred thousand dollars (\$200,000) *except* renewal bonds, or bonds issued to be exchanged for other bonds for the purpose of reducing the rate of interest, district grading bonds, bonds for funding the floating indebtedness, and district street improvement bonds, bonds for the construction and maintenance of subways or conduits or *bonds for the purchase, construction or appropriation of gas works, water works, electric light plants or power plants or land therefor, or land for public parks, parkways or boulevards.* No bonds, except district street improvement bonds, renewal bonds and bonds in exchange for other bonds, district grading bonds and bonds for funding the floating indebtedness shall be issued until the electors of said city shall have authorized the same by a two-thirds vote of the electors of such city, voting on said proposition, at a general or special election of said city held after ten days' notice, published in the official paper of the city, stating the maximum amount proposed to be issued and stating distinctly the purpose for which they are to be issued. *Provided that bonds for water works may be authorized by a majority vote of the electors of the city, voting on such proposition at a general election or by a two-thirds vote cast on such proposition in case it shall be submitted at a special election.* (Amended April 6, 1907, H. R. 157, Sec. 10.)"

1060a, Sec. 217. (*Water board.*) Nothing in this act contained shall be so construed as to interfere with the powers, duties, authority and privileges that have been, are, or may be hereafter conferred and imposed upon the water board in metropolitan cities as prescribed by law, but in all matters relating to a water supply, or to the purchase, acquisition, construction, maintenance and management of a water works plant for such city or in any way appertaining thereto, the said powers, duties, authority and privileges of such water board so far as elsewhere conferred, imposed and defined by law shall be exclusive and paramount.

Water Works.

1076, Sec. 235. (*Water board, election, term.*) In each city of the metropolitan class, there shall be a water board consisting of six (6) members, two of whom shall be elected at the time of the general state election held in the even numbered years, but not more than one of the two members so elected shall be from the same political party. Members of said board shall hold office for a period of six (6) years from the first Tuesday after the first Monday of January following their election, and until their successors shall be elected and qualified; provided, however, that the members of the first water board shall be appointed in such manner and for such terms as hereinafter set forth. (1903, H. R. 67, Sec. 5.) Amended 1905, H. R. 8.)

(Note.—Secs. 235-248. Secs. 5-18 of "An act to provide in cities of the metropolitan class, viz.: 1. For the procedure in certain

cases, by the mayor and council in the acquisition of a municipal water plant;

2. For the creation of a water board, its organization, its powers, its duties, and the compensation of its members and employees;

3. For penalties for interference with water plant or employees of water board in the discharge of their duties;

4. For a Water Fund, its revenues, and the disbursement and application thereof"; and amending certain sections of chap. 12a, Comp. Stats., Laws 1903, H. R. 67. In effect Feb. 2, '03. As amended by an act to amend and repeal secs. 6, 16, 17, 24, 25, 27, 29, 32, 35, 38, 41, 42, 67, 72, 89, 93, 94, 100, 101a, 101c, 122, 135, 198, 199, 200, 203, 204, 205, 208, 209, 211 of chap. 12a, C. S. 1903. "Providing in cities of the metropolitan class, as follows: 1. For the creation of a water board, its organization, its power, its duties, and the compensation of its members and employees; 2. For furnishing water by such cities for domestic, public and fire purposes without the limits thereof; 3. For a water fund, its revenues, and the disbursement and application thereof," also repealing secs. 194, 195, 196, 197 and 210, said chapter, Laws 1905, H. R. 8. In effect March 9, 1905.)

1076a. Sec. 236. (*First board, appointment.*)

The Governor shall appoint the members of the first water board, all of whom shall be electors of such city, two to serve from the date of their appointment for four years, and two from the date of their appointment for two years from the first Tuesday after the first Monday of January following the general election held in the even numbered years next after their appointment; and two to serve until said first Tuesday after the first Monday following the general election

held in the even numbered years next after their appointment. One member for each term herein designated shall be appointed from each of the two political parties casting the greatest number of votes for Governor at the last preceding general election. Such appointments shall be made within thirty (30) days after this act shall take effect; provided, that if in any such city a *de jure* or *de facto* Water Board shall then be in existence, or shall have been in existence within six (6) months prior to such date, then, and in such case, the members of such *de jure* or *de facto* water board shall serve out their terms and continue in office until their successors shall be elected and qualified as herein provided. (*Id.*, Sec. 6, *Id.*).

1076b. Sec. 237. (*Board, vacancies, bond, salary.*) Any vacancy occurring in the water board, shall be filled, for the unexpired term by the remaining members thereof, within thirty (30) days after such vacancy shall occur, the new member to be chosen from the political party represented by his predecessor, it being the intent and purpose, but not the inducement of this act, to render said water board non-partisan in character. Before entering upon their offices, members of the water board shall give bonds for the faithful performance of their duties in the amount of Five Thousand Dollars (\$5,000.00) each, under the same terms and conditions as provided in the case of City officials in such city. The members of said board shall receive as compensation for their services, Six Hundred Dollars (\$600.00) per annum, payable quarterly by warrants drawn upon the water fund. (*Id.*, Sec. 7, *Id.*)

207

1076c. Sec. 238. (*Same, meetings.*) The first meeting of the water board shall be held at eight o'clock P. M. of the first Wednesday of the calendar month next after its appointment, in an office to be provided for the use of the board by the mayor and council. Regular meetings shall be held on the first Wednesday of each calendar month thereafter at such time as the board may designate. Special meetings of the board may be held at any time at the call of the chairman, or at the request of any two members filed in writing with the secretary. (*Id.*, Sec. 8.)

1076e. Sec. 240. (*General authority and power.*) The water board shall have general charge, supervision and control of all matters pertaining to the water supply of such City for domestic, mechanical, public and fire purposes as hereinafter provided: If such City, or any portion thereof, shall be supplied with water for domestic, mechanical, public or fire purposes by any individual copartnership, or corporation, then, and in such case, said board shall have the sole power and authority to regulate and fix water rates and fire hydrant rentals; to provide for and order the extension of water mains; to determine the number and designate the location of all fire hydrants; to audit, pass upon, and pay or reject any and all bills for water or fire hydrants furnished such City; to make, modify, and terminate, on behalf of such City, all contracts for the supply of water to such City for domestic, public or fire purposes. In case such City shall undertake, or shall have heretofore undertaken the purchase or acquisition of the water plant of any person, co-partnership or corporation supply-

ing such City or any portion thereof with water for domestic, mechanical, public or fire purposes, under the powers granted by the Charter of such City or by virtue of any right inuring to such City through contract, or otherwise, or shall vote bonds for such purpose, then, and in such case, said water board shall have the sole power and authority to act on behalf of such City in all matters pertaining thereto, including the appointment of appraisers whenever required; the general supervision of any resulting appraisalment; the acceptance or rejection of any award resulting from any such appraisalment; and of all other negotiations connected with, or pertaining to the acquisition of such water plant. Provided, that no acceptance of any such appraisalment shall be binding upon such city unless bonds are voted for the acquisition of such water plant under such appraisalment. Said bonds are not to be sold for less than par and issued only in case the proposition is ratified by a majority of the votes cast upon the proposition at a general election of two-thirds or the votes cast in case the proposition shall be submitted at a special election. In case such City shall own, operate, or vote bonds for the construction of any water plant for the purpose of supplying water for domestic, mechanical, public or fire purpose, then, and in such case, said board shall have general charge, supervision and control of the design, construction, operation, maintenance and extension or improvement of any such water plant, including the power to appropriate private property therefor, and purchase and contract for necessary material, labor and supplies, and the authority and powers herein conferred upon said water board shall ex-

tend as far beyond the corporate limits of said City as said board may deem necessary. In case said board shall deem it necessary and expedient for such City to vote bonds for the acquisition, construction, extension, or improvement of a water plant to supply such City with water for domestic, mechanical, public or fire purposes, then, and in such case, said water board shall have sole power and authority to determine the amount of such bonds, and to issue the same when voted, and shall also have the power and authority to submit a proposition for voting such bonds at any regular election, or said board may call a special election for such purpose, provided twenty (20) days' public notice is given, stating distinctly the amount and purpose for which said bonds are to be issued. Said water board shall also have power and authority to maintain and defend all suits at law or in equity growing out of the transactions of said board, or any matter pertaining to the water supply of such City, or to the construction, operation, maintenance or acquisition of any water plant by such City, and said board may sue or be sued in the name of the Water Board of the City of * * * (*Id.*, Sec. 10, Amended 1905, H. R., 8).

1076g, Sec. 242. (*Water-rates-Payment-Rules Adjacent city.*) It shall be the duty of the water board and the water board shall be charged with the determination of water rates, the conditions and methods of water service, and the collection of all charges for water service, or the sale of water; provided, that all payments on account of water service, or the sale of water and all other receipts of the board from whatever source, shall

be received and receipted for by the city treasurer, or by an employee of the city treasurer's office, who shall be assigned by said treasurer for such purpose. Provided further, that said water board shall, from the hydrant water tax and water rates to private consumers fixed by said board, and not exceeding the water rates to private consumers now established by ordinance in any such city, provide for all expenses, interest on bonds, and sinking fund. The water board shall have authority to make such rules and regulations for the conduct of any water plant owned or operated by such city, and the use and measurement of water supplied therefrom as it may deem proper and shall also have authority to cut off any water service for non-payment or non-compliance, on the part of the water user, with the rules and regulations adopted by the board for the conduct of its business and affairs. The water board may contract with any municipality adjacent to such city to supply such municipality with water for domestic, mechanical, public, or fire purposes; or may contract, to the same end, with any person, co-partnership, or corporation, supplying any such adjacent municipality with water for domestic, public, or fire purposes, upon such terms and conditions as said water board may deem proper; provided, however, that all water so furnished shall be measured by meter at the expense of such municipality, person, co-partnership, or corporation, as the case may be; and that the rate per thousand gallons, fixed by said water board, shall not be less than the gross average income per thousand gallons for all water furnished such metropolitan City and its inhabitants by such munici-

pal water plant; provided, further, that in computing the income from such water plant, each fire hydrant located with such metropolitan City shall be assumed to produce a reasonable revenue to be definitely fixed by said board. (*Id.*, Sec. 12, *Id.*).

NEBRASKA COMPILED STATUTES, 1907.

"6576, Sec. 6. (*Recovery of real Property-Mortgages.*) An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This action shall be construed to apply also to mortgages. Provided, however, that there shall be no limitation to the time within which any county, city, town, village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots (Amended 1869, 67; 1899, chap. 79).

COMPILED STATUTES OF NEBRASKA, 1907, p. 192.

Chapter 12a—Cities of the Metropolitan Class.

846, Sec. 2. (*Corporate limits.*) The corporate limits of such cities may be fixed and determined by ordinance, but shall be and remain as heretofore until changed or altered in accordance with the provisions of this act or of a general law governing cities and towns. Any city, town or village adjoining any city of the metropolitan

class, may be annexed or merged with such city of the metropolitan class, whenever a proposition for such merger has been submitted at a general election and approved by a majority of the votes cast on such proposition in each city, town or village. The terms of such propositions shall be fixed by ordinance enacted by the city of the metropolitan class and by the city, town or village to be annexed.

Laws of 1905, H. R. 384. In effect April 3, 1905. +